Supreme Court, U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX
VOLUME II of II

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In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins

Reporter's Official Transcript of Proceedings
(Instructions, Closing Argument and Verdict)

October 18, 1989
Towson, Maryland

Before:
Honorable J. William Hinkel, Associate Judge And a Jury

* * * *

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* * * *

7 THE COURT: Ladies and gentlemen, it is now time
8 for me to instruct you with respect to the law. I will first
9 give you some general instructions on the law that apply to
10 all of this proceeding, and then I will instruct you on the
11 law that additionally applies to capital sentencing
12 proceedings.
13 My instructions concerning the law are binding
14 upon you and must be followed in determining the sentence. It
15 is, however, your recollection of the facts and your
16 determination of the weight and credibility of any facts and
17 testimony which controls.
18 You must determine the facts from the evidence
19 received in this trial and not from any other source. A fact
20 is something proved directly or circumstantially by the
21 evidence or by stipulation. Stipulation is an agreement
22 between attorneys regarding the facts.

23 You must apply the rules of law that I state to
24 you to the facts as you determine them to be, and in this way
25 arrive at your decision. Wherever in the course of these

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1 instructions I use the term sentence, decision, verdict,
2 they're basically the same meaning. What I'm referring to is
3 your ultimate decision with respect to sentencing.
4 You must accept and follow the law as I state it
5 to you, whether or not you agree with the law. If anything
6 concerning the law is said by the lawyers in their arguments
7 or at any other time during the trial which conflicts with my
8 instructions on the law, you must follow my instructions. You
9 must conscientiously consider and weigh the evidence and apply
10 the law. Any verdict you return must be a just verdict.
11 In determining the facts of the case, you should
12 make a finding of the facts solely from the evidence which has
13 been introduced at this trial, the evidence which you have
14 seen and heard and not from anything which you have seen or
15 heard elsewhere. This includes any reasonable inferences
16 which may be drawn from the evidence. Where there are two
17 inferences which may reasonably be drawn from the same
18 evidence, the defendant is entitled to the inference which is
19 favorable to him.
20 The evidence in this case which you are to
21 consider in arriving at your verdict is the testimony which
22 you have heard from the witness stand, the exhibits which have
23 been received into evidence, and the stipulations which have
24 been made by the parties.
25 A stipulation is the term used for an agreement

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1 made by the lawyers in a case. Stipulations are binding and
2 conclusive on the respective parties. When the attorneys on
3 each side stipulate to the existence of a fact or event, that
4 fact or event is deemed to be evidence in the case and you
5 should regard it as proof.
6 In this case, the parties entered into a number
7 of stipulations which are marked as exhibits and they are
8 titled stipulations, and you will see them in the evidence
9 that you take back to the jury room with you.
10 The law permits you to infer that the possessor
11 of recently stolen property, that is, property taken in a
12 crime, is the person who stole the property. It is not
13 required that you draw that inference. This inference is
14 permissible only if it is reasonable and there is no other
15 reasonable inference to be drawn from the evidence.
16 A defendant has a common law right to allocution,
17 that is, to address the sentencing body in mitigation of
18 punishment. You, of course, are the sentencing body.
19 Although this statement in allocution is not sworn testimony
20 and during allocution he is not under oath and is not
21 subjected to cross-examination, the defendant's allocution is
22 evidence and you should give it the weight and credence you
23 would give any other piece of evidence.
24 Any questions that I may have asked during the
25 course of the trial were merely to elicit information or to

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1 clarify testimony so you could have all the facts clearly
2 before you. You should not read into my questions any feeling
3 one way or the other regarding any witness, any testimony, or
4 the issue in the case, nor should you try to ascertain from my

questions or my conduct what I feel your decision should be.
That is for you to decide.
Ladies and gentlemen, you are the sole judges of whether a witness should be believed. In making this decision, you may apply your own common sense and everyday experiences. In determining whether a witness should be believed, you should carefully judge all of the testimony and evidence and the circumstances under which that witness testified. You should consider such factors as the witness' behavior on the stand and manner of testifying, did the witness appear to be telling the truth, the witness' opportunity to see or hear the things about which testimony was given, the accuracy of the witness' memory, does the witness have a motive not to tell the truth, does the witness have an interest in the outcome of the case, was the witness' testimony consistent, and was the witness' testimony supported or contradicted by evidence that you believe.
You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witness. What I'm saying to you, it is for you to determine what it is you believe the facts to

be from all of the evidence.
In weighing the testimony and arriving at your decision, you are not to be influenced by questions of public interest or policy, or the effect your verdict may have upon other persons charged with crimes, or whether the verdict should or would not be pleasing to me. Your verdict must be based upon the evidence or lack of it, and nothing else.
You are also instructed that a witness who has special training or experience in a given field is permitted to express opinions based on observed or assumed facts to aid

you in deciding the issues in the case. In weighing the opinions of an expert, you should consider the expert's experience, training and skills, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. You should give the testimony the weight and value you believe it should have.
You are not required to accept any expert's opinion. You should consider an expert's opinion together with all of the other evidence. If contradictory or conflicting testimony is put forth by expert witnesses, you must resolve the conflict and determine how much weight to give to any opinion. Of course, I'm referring to those persons who were offered and accepted by the Court as experts in this case.
Evidence consists of testimony of witnesses,

writings, material objects, or anything presented to the sentencer and offered to prove the existence or nonexistence of facts.
In this case we have got evidence coming in several forms. Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves a fact, without the necessity of any inference. It is evidence which by itself, if found to be true, establishes the fact.
Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
It is not necessary that the facts be proved by direct evidence. They may be proved also by circumstantial

17 evidence or by a combination of direct evidence and
18 circumstantial evidence. Both direct evidence and
19 circumstantial evidence are acceptable as a means of proof.
20 Neither is entitled to any greater weight than the other.
21 Now, ladies and gentlemen, Kevin Wiggins has been
22 convicted of murder in the first degree of Florence Lacs and
23 the robbery of Florence Lacs. This conviction is binding upon
24 you. Even if you believe the conviction to have been in
25 error, you must accept that fact. You may, however, consider

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1 the evidence presented in this trial concerning his guilt in
2 reaching your decision in this case.
3 At this time, I'm going to ask my law clerk, if
4 she will, to pass out to you the sentencing form.
5 Does everyone have one? Okay. These copies have
6 been prepared for each of you to review while I give these
7 instructions and to refer to by you during your deliberations.
8 You will be provided with the original of the
9 verdict form, which I have here in order to record your
10 verdict. The original, which is marked original, is the
11 official document on which you are to record your verdict and
12 which each of you must sign.
13 Although the form contains spaces for answers to
14 be checked off, you are not to engage in a mere mechanical
15 tallying of aggravating and mitigating circumstances. It is
16 your duty to weigh each of the factors, both aggravating and
17 mitigating, to determine whether the sentence shall be life
18 imprisonment or death.
19 Your first task is to determine in Section I,
20 which is the first page -- your first task, as I said, is to
21 determine in Section I of this form whether you are
22 unanimously persuaded beyond a reasonable doubt that the

23 defendant was a principal in the first degree to the murder of
24 Florence Lacs.
25 The defendant's conviction of first degree murder

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1 does not establish that he was a principal in the first
2 degree. A principal in the first degree is one who actually
3 committed the murder by his own hands. The State has the
4 burden of persuading you beyond a reasonable doubt that the
5 defendant was a principal in the first degree to the murder.
6 The defendant is not required to persuade you that he was not
7 a principal in the first degree.
8 A reasonable doubt is a doubt founded upon
9 reason. It is not a fanciful doubt, a whimsical doubt, or a
10 capricious doubt. Proof beyond a reasonable doubt requires
11 such proof as would convince you of the truth of a fact to the
12 extent that you would be willing to act upon such belief
13 without reservation in an important matter in your own
14 business or professional affairs.
15 Now, if you do not find beyond a reasonable doubt
16 that Kevin Wiggins was a principal in the first degree, that
17 is, you do not find that Kevin Wiggins was the person who
18 actually caused Florence Lacs' death, then you much check not
19 proven as to item Number 1 under Section I.
20 You must then proceed directly to Section V and
21 state that conclusion in writing by filling in life
22 imprisonment in the space at the end of Section V. If life
23 imprisonment is entered in Section V, you must then proceed to
24 Section VI.
25 Now, if you do find beyond a reasonable doubt

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that Kevin Wiggins was a principal in the first degree, that is, that the defendant was the person who actually killed, caused Florence Lacs' death, then you must check proven as to this item under Section I. If you check proven, then you must proceed to Section II. Turn to the Section page and you will see Section II.

In determining the existence or nonexistence of the aggravating circumstance under Section II, you must consider whether the State has proven beyond a reasonable doubt that Kevin Wiggins committed the murder of Florence Lacs while committing or attempting to commit a robbery.

Robbery is the taking and carrying away of someone else's personal property directly from that person or from her presence by violence or by putting that person in fear with the intent to steal the property. In order to determine that a robbery has occurred, the State must prove that the defendant obtained possession of personal property belonging to someone else, that the property was taken either directly from another person or from another person's presence and control, that the taking was accomplished by violence or by putting the other person in fear of violence, and that the defendant intended to permanently deprive the other person of that property. Of course, the other person I'm speaking of here is Florence Lacs.

Property is taken from the victim's presence if

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it is within her control, so that she could have prevented its taking had she not been killed. The robbery need not be completed until after the victim's death. The killing alone may constitute the element of force. The intent to steal need

not be performed until after -- that is, the intent to steal need not be formed until after the force, even if the force results in death. A taking after death is nevertheless robbery.

It is your duty to decide whether the State has proven beyond a reasonable doubt that the murder occurred in the course of the aggravating circumstance of robbery or attempted robbery. Aggravating as used here means something which makes a thing worse. If you do not find beyond a reasonable doubt that the murder occurred during the aggravating factor, that is, that Kevin Wiggins did not commit the murder of Florence Lacs while committing or attempting to commit a robbery, then you must check not proven as to this item under Section II.

If you do find beyond a reasonable doubt that the aggravating factor exists, that is, that Kevin Wiggins did commit the murder of Florence Lacs while committing or attempting to commit a robbery, then you must check proven as to this item under Section II.

If this item is checked not proven, you must then proceed directly to Section V and state the conclusion in

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writing by filling in life imprisonment in the space at the end of Section V. If life imprisonment is entered in Section V, you must then proceed to Section VI.

If this aggravating circumstance under Section II is marked proven, then you must proceed to Section III. Section III begins at the bottom of Page 2. In determining whether mitigating circumstances exist under Section III, you must determine whether the defendant has shown by a preponderance of the evidence that they do exist.

Each one of you should individually consider each

circumstance. If you do agree unanimously by a preponderance of the evidence that the mitigating circumstance exists, you must check (a). You will see that there are three places, (a), (b) and (c). You must check (a) under the corresponding mitigating circumstance under Section III.
THE FORELADY: Ours is already checked off.
THE COURT: I'll get to that. Hold on. If you unanimously find by a preponderance of the evidence that the above circumstance does not exist, you must check (b) under the corresponding mitigating circumstance under III. If after a reasonable period of deliberation one or more of you, but fewer than all twelve, find by a preponderance of the evidence that the mitigating circumstance exists, you must check (c) under the corresponding circumstance under Section III.

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To prove something by a preponderance of the evidence means to prove that something is more likely so than not so. It is not as high a standard as beyond a reasonable doubt.
A mitigating circumstance is simply any aspect of a person's character or background or any of the circumstances of the offense offered to you as a basis for a sentence less than death.
Now, in determining whether mitigating circumstances exist by a preponderance of the evidence, you must consider the following mitigating circumstances. There are seven statutory mitigating circumstances, and I'll go through each one of those for you now.
(1), Kevin Wiggins was not previously -- or has not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a

crime of violence, or had been granted probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph as I explain it to you now, crime of violence means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

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You are instructed that the State and the defendant agree that this circumstance exists, and your form has been premarked proven. That is, that he has not been convicted of the things I just listed for you. So that's why that's marked not proven -- excuse me, proven. They agree that it is proven as a mitigating circumstance.
Now, you must address yourselves to determining whether the remaining statutory mitigating circumstances exist. They are:
(2), Florence Lacs was a participant in Kevin Wiggins' conduct or consented to the act which caused her death.
(3), Kevin Wiggins acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.
(4), the murder was committed while the capacity of Kevin Wiggins to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance or intoxication.
(5), the youthful age of Kevin Wiggins at the

time of the crime.
(6), the act of Kevin Wiggins was not the sole
proximate cause of the death of Florence Lacs.

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And, (7), it is unlikely that Kevin Wiggins will
engage in further criminal activity that would constitute a
continuing threat to society.
They are the seven statutory mitigating
circumstances.
Under (8) you will see any other facts which you
specifically set forth in writing that you find as mitigating
circumstances in the case, that is, any other evidence of
probative value and relevant to sentencing, including any
evidence you have learned in court about the defendant and the
crime.
Section (8) mitigating factors are non-statutory
mitigating factors. This is where you are each allowed to
list anything you personally find constitutes a mitigating
circumstance.
In order to find that a mitigating factor exists
under Section (8), you must find two things by a preponderance
of the evidence. You must first find that the alleged
circumstance exists in this case. You must next find that the
alleged circumstance is in fact mitigating.
You may consider evidence relating to the
defendant's background, as well as relevant and material
conduct of the defendant up to and including this sentencing
proceeding. Those non-statutory mitigating circumstances upon
which you unanimously agree are listed in (8)(a). Those upon

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which you cannot reach unanimity are listed in (8)(b). If any
one of you determines by a preponderance of the evidence that
a mitigating factor exists, but all twelve of you don't agree
upon it, you still list that under (8)(b). With respect to
the mitigating circumstances, each one of you should
individually consider each circumstance.
Next you shall then determine whether by a
preponderance of the evidence the aggravating circumstance
outweighs the mitigating circumstances. If you do not find by
a preponderance of the evidence that the aggravating
circumstance outweighs the mitigating circumstances, the
sentence shall be life imprisonment. You must then proceed
directly to Section V and state that conclusion in writing by
filling in life imprisonment in the space at the end of
Section V.
If you unanimously find that the State has proven
by a preponderance of the evidence that the aggravating
circumstance does outweigh the mitigating circumstances, then
consider whether death is the appropriate sentence. You must
then proceed directly to Section V and state that conclusion
in writing by filling in death or life imprisonment in the
space at the end of Section V. If death is entered in Section
V, do not proceed to Section VI. If life imprisonment is
entered in Section V, you must then proceed to Section VI.
If you unanimously find that the sentence of life

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imprisonment should be without the possibility of parole, mark
yes in the space provided. If you unanimously find that the
sentence of life imprisonment should be with the possibility
of parole, mark no in the space provided. Your determination

shall be in writing on the original form given to your Forelady and shall be signed by the Forelady and all members of the jury.
It is proper for you to exercise your own moral, factual and legal judgment in determining whether any aggravating circumstance you may find is sufficient in your mind to call for the punishment of death. You may decide that the aggravating factor proved by the State is not a sufficient reason to impose a death sentence and on that basis alone decide to impose a life sentence. Nothing in the law forbids you from extending mercy out of the belief that life imprisonment is sufficient punishment under all the circumstances.
If you sentence Kevin Wiggins to life imprisonment without the possibility of parole, he will never be eligible for parole. If you sentence the defendant to life imprisonment, he will not be eligible for parole considerations until he has served twenty-five years or the equal of twenty-five years when considering certain allowances for diminution for the period of confinement provided for in Article 27, Section 700 and Article 27, Section 638 C of the

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Annotated Code of Maryland.
Additionally, in the event that at some future date the Parole Commission recommended that Kevin Wiggins be released on parole, he could only be paroled if that decision was specifically approved by the Governor of Maryland.
The Supreme Court of the United States as well as the Court of Appeals of Maryland have determined that the death penalty or capital punishment is constitutional and legal in such cases and under such circumstances as the law provides. I cannot overrule your decision. The

responsibility for determining whether the death penalty should be imposed rests solely with you, and you must act with due regard for the consequences of your decision.
Now, let me just restate a couple of things. The State has the burden of proving that Kevin Wiggins was a principal in the first degree of murder and the aggravating circumstance beyond a reasonable doubt.
The defendant has the burden of proving the existence of mitigating circumstances by a preponderance of the evidence.
The State has the burden of proving that the aggravating circumstance outweighs the mitigating circumstances by a preponderance of the evidence.
Now, before arriving at your verdict, you are to consider all of the evidence in the case. You are to consider

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all of the evidence that is favorable to the defendant, as well as all which is unfavorable to him. Moreover, your verdict, whatever it may be, must be the unanimous verdict of all twelve members of the jury.
Do counsel wish to see me here at the bench?
MS. BROBST: Yes, your Honor.
MS. NETHERCOTT: Yes, your Honor.
(Counsel and the defendant approached the bench and the following ensued:)
MS. BROBST: Thank you, your Honor. I don't know if you defined unanimity. That was the only thing I noticed that wasn't given a definition.
THE COURT: It must be the unanimous verdict of all twelve members of the jury. If you want me to say that unanimous means all twelve members of the jury, does the defense wish me to say that?

17 MS. NETHERCOTT: I have no problem with that.
18 MS. BROBST: On mitigating circumstance No. 1,
19 you misspoke and didn't say under crimes of violence and
20 attempt to commit. You just said commit.
21 THE COURT: Okay.
22 MS. BROBST: I think that's in his favor and
23 should be said. And in mitigating circumstance No. 4, you
24 said intoxication, which no longer exists and is not on the
25 form.

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1 THE COURT: I took it right out of your
2 instruction.
3 MS. BROBST: I am not objecting to that; I'm just
4 pointing out what I noticed.
5 THE COURT: Does the defense have any problem in
6 it being in there?
7 MS. NETHERCOTT: It is not really an issue.
8 THE COURT: Do you object to it? Do you want me
9 to go back and change it?
10 MR. SCHLAICH: No.
11 MS. BROBST: The other thing, we would except at
12 this time to your instruction in Section V which states that
13 if they find that the aggravating circumstance outweighs the
14 mitigating circumstances by a preponderance of the evidence,
15 then they should go on to consider whether the sentence of
16 death is appropriate. And we would except, also, to your
17 instructions at that point.
18 THE COURT: Okay. First, as to the exceptions of
19 the State, do you wish me to correct any of those that the
20 State has raised?
21 MR. SCHLAICH: No, sir.
22 THE COURT: Okay. Now, your exceptions?

23 MS. NETHERCOTT: Thank you, your Honor. Just
24 bear with me a second. I'm trying to put them in numerical
25 order.

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1 Your Honor, with regard to the Court's
2 instructions regarding allocution, I understand that the Court
3 of Appeals of Maryland has ruled that in the event a defendant
4 allocutes, the State is permitted to comment on his failure --
5 I understand the Court of Appeals of Maryland has agreed that
6 in allocuting, if the defendant elects to allocute, the State
7 is free to comment on the fact that the defendant was not
8 under oath. And I understand the Court is bound by that.
9 However, for purposes of federal preservation of
10 the issue, I would object to that instruction as an
11 impermissible comment of the defendant's failure to testify
12 under Zant v. Stephens. I don't have the citation.
13 Essentially the argument is, your Honor, that the
14 right of allocution is meaningless if it is in fact opening
15 the defendant into having that turned around to arguing that
16 goes to the punishment of the death penalty. So I would
17 except to the Court's instruction with regard to that. And
18 for the record I would note that defendant's proposed
19 instruction 4 is what we would ask to be made part of the
20 record.
21 With regard to the instruction on robbery, your
22 Honor, I would reiterate what I had said in chambers yesterday
23 regarding the Stebbing and Foster issue, that is, that a
24 capital crime is a separate category of crime; therefore,
25 there should be a stricter standard with regard to

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construction of that felony murder doctrine and it should require a showing of a contemporaneousness of an intent to do the act. I would argue those cases are factually distinguishable from the evidence presented in this case and except to that.
I would also except to the Court's instructions with regard to the definition of aggravating as something that makes it worse, that aggravating in this context is a reason to impose the death penalty.
I would object, take exception to the Court's instruction regarding the preponderance of evidence standard that the Court instructed on. With regard to the defendant's burden to produce and persuade with respect to the existence of both statutory and non-statutory mitigating circumstances, I would argue as I argued pretrial that the defendant should not bear any such burden. That is unconstitutional both under the Maryland Declaration of Rights, Article 21 through 24, and the Federal Constitution, Amendments 5, 8, 6 and 14.
Also, on the question of the mitigating circumstances, I would take exception to the Court's failure to instruct as requested by defense counsel in defense proposed instruction 14, that the jury be advised that mitigation evidence is not an excuse or justification.
With respect to the weighing process of the aggravating and mitigating factors, again I would except to

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the Court's instruction on that, and note for the record that I would have asked that the Court instruct with regard to the weighing process on aggravating and mitigating circumstances, and specifically request at this time again that the Court

instruct in accordance with defendant's proposed instruction 15 on that point for all the reasons and authorities given in support of those reasons in the instruction. Essentially the instruction would require that the State prove beyond a reasonable doubt rather than by the lower preponderance of evidence standard.
With respect to the Court's instruction on life without parole, the defense would except and ask that the Court -- again ask the Court instruct in accordance with defendant's proposed instruction No. 22. The specific difference between the Court's instruction and ours is we would ask that the State prove beyond a reasonable doubt that an appropriate sentence would be life without the possibility of parole.
Just bear with me for one minute, Judge. Your Honor, I would ask at this time that the instructions I've referred to by number here be incorporated as part of the record and, in addition, that the defendant's proposed sentencing and findings and determination form which reflects the various exceptions that I'm making at this time and the objections I have raised pre-sentence with regard to all of

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these things I've outlined be incorporated as exhibits and made part of the record.
THE COURT: That will be done. Anything else?
MS. NETHERCOTT: I don't think so.
THE COURT: Does the State wish to respond?
MS. BROBST: No. We would request that you not grant any of the exceptions the defendant has raised.

* * * *

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1 THE COURT: Ladies and gentlemen, at this time
2 you will hear the closing statements of counsel. Ms. Coffin?
3 MS. COFFIN: Thank you, your Honor.
4 Ladies and gentlemen, I'd like to begin by
5 thanking you for the undertaking you have done in this
6 proceeding. You have undertaken this awesome responsibility.
7 What you are going to decide today is not -- you did not seek
8 out, but you did agree to perform.
9 I also would like to tell you that neither myself
10 nor Ann Brobst enjoy being in these proceedings.
11 MR. SCHLAICH: Objection.
12 THE COURT: Overruled.
13 MS. COFFIN: We do not relish standing up here
14 and asking you to sentence Kevin Wiggins to death. But it is
15 our job, and it is your job as well --
16 MR. SCHLAICH: Objection.
17 MS. NETHERCOTT: Objection.
18 THE COURT: Overruled.
19 MS. COFFIN: -- as the defendant has elected to
20 have you make that decision.
21 On Thursday you folks came into this courtroom
22 and you all swore an oath, each and every one of you. You
23 swore in that oath that none of you had such strong feelings
24 about the death penalty one way or another that would cause
25 you to automatically vote for or against it. And we call upon

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1 you today to live up to that oath. We call upon you today to
2 render a sentence that is right and a sentence that is just.
3 At this point in the proceeding, as the Judge has
4 instructed you, the defendant has been found guilty of the

5 murder of Florence Lacs and the robbery of Florence Lacs.
6 However, in this proceeding, you have additional findings you
7 must make, as the Judge has just instructed you.
8 You must make the determination as to whether
9 Kevin Wiggins was the principal in the first degree, that is,
10 did he actually cause the death of Florence Lacs.
11 You also must determine whether there is an
12 aggravating circumstance in this case beyond a reasonable
13 doubt, that is, whether the murder was committed while the
14 defendant was attempting to commit or committing the robbery.
15 Over these past several days you have heard a
16 great deal of evidence, a good bit of which has been
17 circumstantial evidence. The judge has instructed you what
18 circumstantial evidence is.
19 Circumstantial evidence is proof of a collateral
20 fact on which you may infer the remaining facts, based upon
21 your common sense and reason. That circumstantial evidence is
22 not to be given any more weight or less weight than any other
23 evidence.
24 Going back to our first day, or actually the
25 second day, Ms. Nethercott addressed you in opening, and she

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1 told you that no one actually saw Kevin Wiggins murder
2 Florence Lacs or rob her. And that's right.
3 Only two people know exactly what happened on
4 September 15, 1988. One is dead and one is being sentenced
5 here today for the murder. What we do have is evidence that
6 when pieced together tells us how, when, and who murdered
7 Florence Lacs.
8 How did Florence Lacs die? Dr. Korell testified
9 from the Medical Examiner's Office that the manner of death
10 was homicide. She based that opinion on a number of factors.

Those factors were her home had been ransacked. Her property was taken. She was found submerged in a bathtub. She was found submerged in a bathtub with clothes on. She was wounded, and there was Black Flag sprayed on her body. You also heard Dr. Korell testify as to the cause of death, cause of death being drowning, combined with Mrs. Lacs' physical condition, her heart disease, which Dr. Korell termed hardening of the arteries, something we know, combined also with the stress of her situation.

This opinion is based upon the facts that during the course of the autopsy Dr. Korell found Florence Lacs' lungs were boggy, the condition of her heart at the time of her death, and the fact that she was submerged in a bathtub when she was found on the 17th of September.

Dr. Korell was asked by Mr. Schlaich, would her

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opinion be different if Florence Lacs had been found dead on the floor, would that opinion be that she had a heart disease or heart attack. Ladies and gentlemen, Florence Lacs was not found on the floor; she was found submerged in the bathtub. And Kevin Wiggins is no less responsible for her murder because when he forced her head under water her heart also stopped.

We have evidence that when we piece it together, we know now Florence Lacs was murdered. Florence Lacs was last seen alive on September 15th by Delores Elgert at approximately 4 p.m. when Mrs. Lacs dropped Mrs. Elgert off at the senior citizens' luncheon.

At that time Mrs. Elgert tells us Florence Lacs was wearing a white blouse and a light blue skirt. Ladies and gentlemen, when you go to deliberate, view those photographs. Look at what Florence Lacs is wearing. She is in a white

blouse and blue skirt, the same clothes she was wearing on Thursday, the 15th of September.

We heard testimony from Detective Crabbs when he was processing the scene that in her clothes hamper he found three kitchen towels, a pink blouse and a pair of yellow underwear, no dress, no red skirt.

We also know that Mrs. Lacs was alive at approximately 4 to 5 p.m., 5 p.m., when Chianti Thomas saw her outside of her apartment, 1951 Apartment C Woodlawn Drive.

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Chianti tells us at that time the defendant was also with her. What an incredible coincidence that the defendant is seen with Mrs. Lacs the last time she was seen alive.

We have the TV Guides Detective Crabbs testified to. Those TV Guides have been marked the dates of September 10th through the 15th, Thursday. They were unmarked September 16.

MR. SCHLAICH: Objection. Your Honor, may we approach the bench, please?

THE COURT: Overruled.

MS. COFFIN: We also have evidence that the defendant had in his possession on September 15th Florence Lacs' Hecht's card. He was shopping at Hecht's 8:57 p.m. on Thursday with Florence Lacs' credit card.

He had her car on the 15th, approximately 7 p.m., when he went to pick up Geraldine Armstrong. He was in Mrs. Lacs' car.

What an incredible coincidence that the man who was seen with Mrs. Lacs when she was last seen alive is now in possession of her credit card and her car.

We had testimony in this case from three medical examiners, all of whom testified that they could agree to one

23 thing. They could not pinpoint or exactly establish a time of
24 death. What they could give us was ranges and estimations.
25 The State had two medical examiners who testified

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1 that the range was twenty-four to forty-eight hours from the
2 time Mrs. Lacs was found. The defense's expert testified that
3 the range of death was twenty-four to thirty-six hours from
4 the time she was found dead.
5 Ladies and gentlemen, the key piece of evidence
6 to determine when Florence Lacs died does not come from an
7 expert. It comes from using your common sense on the basis of
8 facts that are in evidence. We know that Kevin Wiggins had
9 Florence Lacs' car and credit card the evening of September
10 15, 1988. When he had her property, she was surely dead. She
11 didn't live beyond the ransacking of her home, the taking of
12 her property, turning over of her personal wallet and the
13 taking of her keys. We know he had this property as a fact
14 per the stipulation.
15 He had her Hecht's credit card on the 15th as
16 well as her Penney's credit card. This tells us the time of
17 death based on common sense.
18 This leads us also to the testimony of Edythe
19 Vassar. Mrs. Vassar testified that she was a friend of
20 Florence Lacs. She testified that she spoke on the telephone
21 with Florence Lacs on September 16th, Friday, in the morning.
22 Ladies and gentlemen, Edythe Vassar is not lying,
23 but she is mistaken, and she is mistaken for the same reason.
24 Mrs. Vassar testified that in the course of that conversation
25 on the 16th in the morning, nothing unusual occurred, that

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1 Mrs. Lacs said, I have to go back to the store, a quick
2 conversation.
3 By the 16th, the defendant had had Mrs. Lacs' car
4 overnight and was shopping with her credit cards. When Mrs.
5 Vassar tells us that Mrs. Lacs said, I've got to go back to
6 the store, that indicates Mrs. Lacs surely must have been to
7 the store that morning and that she needed to go back. Mrs.
8 Lacs could not have gone to the store on the 16th and not
9 discovered her car missing, not discovered her wallet missing,
10 and her credit cards gone. And had she made these
11 discoveries, she surely would have told Mrs. Vassar in the
12 phone conversation that occurred on the 16th.
13 Mrs. Lacs did not live in that apartment after
14 her car was taken, the apartment was ransacked, and the credit
15 cards taken and her keys taken.
16 What evidence is there as to who murdered
17 Florence Lacs in this case, who actually caused the death of
18 Florence Lacs? The defendant had opportunity, guilty
19 knowledge, and he was in possession of recently stolen
20 property.
21 On Wednesday, the 14th of September, the
22 defendant got a job at the Park Manor Apartments, the complex
23 where Mrs. Lacs lived. On Thursday, the 15th of September,
24 the defendant was working in Apartment F, directly across from
25 Apartment C, 1951 Woodlawn Drive, where Florence Lacs lived.

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1 The defendant knew what car Mrs. Lacs owned. She
2 identified that car to him when she called from the window to
3 the defendant, are you blocking my car, I need to go out.
4 He was seen talking to Mrs. Lacs at approximately

5 5 p.m., the last time she was ever seen alive. At this point
6 he knew her, her apartment, and her car.
7 We have evidence that approximately between 4:45
8 and 5 o'clock the defendant was engaged in moving sheetrock at
9 no one's request or direction, that after he had moved the
10 sheetrock, he returned to the maintenance office and he
11 informed Robert Weinberg that he had done this. This return
12 was approximately twenty minutes after he had been released.
13 Ladies and gentlemen, why did he do these things?
14 Was he worried about the sheetrock left outside, that he had
15 to bring it inside the apartment complex so that nothing would
16 happen to it? Well, we know from Chianti Thomas that he
17 didn't feel confident having it in the apartment complex
18 because he asked Mrs. Lacs to watch it. We know he didn't
19 have a key to Apartment F. He couldn't put it in there.
20 We also know that he was not so concerned that
21 when he returned to the maintenance shop and told Mr. Weinberg
22 what he had done, that he said, we should lock this up, give
23 me the keys to the apartment or to the car so I can take care
24 of this. Why did he do these things? He didn't care about
25 the sheetrock. He needed to explain, if seen, why he was

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1 still in the area.
2 Why did he leave the sheetrock? The defendant
3 used that sheetrock to meet, to know Florence Lacs. At this
4 point the defendant knew Florence Lacs, and now Florence Lacs
5 knew the defendant. They had spoken. This is important.
6 There was no forced entry into her apartment. She opened the
7 door and let her murderer in.
8 We have evidence that the defendant was in
9 possession of recently stolen property. The Judge has
10 instructed you that you may infer all reasonable inferences

11 from that possession, that you may infer that the possessor of
12 recently stolen property is the thief.
13 Ladies and gentlemen, you may infer that when --
14 MR. SCHLAICH: Objection.
15 THE COURT: Overruled.
16 MS. COFFIN: -- when the theft occurred and the
17 robbery also takes place, that the possessor is also the
18 robber. And if during the course of a robbery that victim is
19 murdered, you may reasonably infer that the robber was the
20 murderer.
21 In this case, how recent is the possession of
22 these stolen goods? Again, Florence Lacs had her property 4
23 p.m. on the 15th, when she dropped Mrs. Elgert off at the
24 senior citizens' luncheon. By 7 p.m. the defendant has her
25 car. By 8:57 he is shopping in Hecht's.

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1 On the 16th, he is using her Hecht's, her
2 Penney's, and her Sears credit card. By the 17th, he and
3 Armstrong have pawned Mrs. Lacs' engagement ring. That pawn
4 ticket was found in the defendant's wallet when he was
5 arrested.
6 The defendant had guilty knowledge of Mrs. Lacs.
7 Throughout this -- of his possession, he lied to Geraldine
8 Armstrong. The credit cards weren't his. The car was from a
9 friend. The ring was found.
10 When he was shopping at Penney's he gave a false
11 name and a false address to Jeanetta Washington at J. C.
12 Penney's on a client card. He gave a false address on the
13 diamond certificate to Jeanetta Washington. And this is
14 interesting. The address he gave is 1951 Walnut Avenue, 1951.
15 Why? Why? Because he knew that address and he knew that
16 complex.

When the defendant was arrested, he made the statement to Detective Crabbs. While in the course of making that statement, Detective Crabbs asked the defendant where were you employed prior to your getting possession of that car? The defendant at that time says, I worked at 2051 Woodlawn Drive.
We know from Geraldine Armstrong the defendant knew that complex. He lived there. Why did he give a false address to Detective Crabbs? We know from the diamond certificate that

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he knew the right address, 1951. Why? He needed to put distance between himself and the place where he committed this murder.
He was asked by Detective Crabbs, had you ever seen that car before. The defendant said, I can't say I never seen it before in my life. I can't say I've never seen it before. Why did he say that? Because he knew he had seen it before and he knew Robert Weinberg had seen it before. In his statement he says, I saw the car on Friday, September 16, when it was stolen from the Roy Rogers parking lot. At that time I found the credit cards and I found the ring.
Why Friday? When he knew he was using those credit cards the night before Friday in Hecht's, making purchases. Why Friday? To put distance between himself and the murder.
Ladies and gentlemen, what we have is an incredible set of coincidences, coincidence that the defendant worked directly across in the apartment where Florence Lacs was murdered, coincidence that he knew her, her car, and her apartment, coincidence that he was the last one seeing her when she was last alive, coincidence that he was in possession of her credit cards, the car, the keys and engagement ring.

Incredible. So incredible that it is not mere coincidence.
Each piece of evidence points to Kevin Wiggins as the murderer of Florence Lacs, and Kevin Wiggins alone. Based

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upon this evidence, the State is asking you to find beyond a reasonable doubt that the defendant actually caused the murder of Florence Lacs, that he was a principal in the first degree.
It is also based upon this evidence that we are asking you to find the aggravating circumstance, that the murder was committed while the defendant was attempting to commit or committing a robbery.
The Judge instructed you that a robbery is the taking and carrying away of personal property of another from their person or their presence by violence or putting them in fear of violence, and having the intent to permanently deprive.
Further, the law recognizes that property is taken from the victim's presence if it is within her control, such that she could have prevented its taking had she not been killed. The killing alone may constitute the element of force. And the taking after death is robbery.
Now, the defense may argue to you that there is no specific evidence as to the time sequence of these events, as to the time sequence of the murder and the robbery. Again, they are right. But based upon the law as the Judge has instructed you and the facts that you have, you can find beyond a reasonable doubt that this murder was committed while attempting to commit or committing a robbery.
We know that the defendant took and carried away

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1 Mrs. Lacs' property and converted it to his own use. We know
2 this based upon the stipulations. And we know it from the
3 defendant's own statement. Thus we have that element of
4 robbery.
5 We have evidence that the property taken from her
6 was in her presence. We have evidence that the keys and the
7 credit cards were in her presence. Mrs. Vassar testified that
8 Mrs. Lacs had one set of keys and that one set of keys had
9 both her car keys and her apartment keys on them.
10 We also know that on the 15th at 4 o'clock, Mrs.
11 Lacs used her car, went home, and used her keys to get into
12 her apartment. Those keys were in her presence on the 15th.
13 We know, also, from Mrs. Vassar that Mrs. Lacs
14 kept her credit cards in her wallet, that when she had been
15 shopping with Mrs. Lacs, no cards were removed from the
16 wallet.
17 We know from Detective Crabbs that the wallet was
18 found in her bedroom on her bed in her home next to the purse
19 that had been emptied, or the wallet that had been emptied.
20 If she had been alive during the taking of that property, that
21 property was taken from her presence. And if she were dead
22 when that property was taken, it was taken from her presence,
23 because as the law says, the property was in her presence and
24 she could have prevented it but for her death, prevented the
25 taking.

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1 We have evidence that force was used in this.
2 There is evidence that there was bruising on Mrs. Lacs' body.
3 There is evidence that a struggle occurred prior to her death.
4 That evidence is one slipper was left in the hallway. The

5 other was taken to the bathtub where she was murdered. The
6 murder itself constitutes the force necessary to meet this
7 element.
8 And, ladies and gentlemen, the taking after death
9 is a robbery. All of this evidence shows that the murder was
10 committed while the defendant was attempting to commit or
11 committing a robbery. And we ask you to find that beyond a
12 reasonable doubt.
13 Having made these determinations and the findings
14 that the defendant was a principal in the first degree and
15 that the State has proven the aggravating circumstance beyond
16 a reasonable doubt, you must then engage in a balancing
17 process, that is, that the aggravating circumstance outweighs
18 the mitigating circumstance by a preponderance of the
19 evidence. And in so weighing, you make the decision as to
20 whether the appropriate sentence is life imprisonment or
21 death.
22 The State has conceded in this case that one of
23 the mitigating circumstances exists, that is, that the
24 defendant has no previous convictions or probations before
25 verdict for crimes of violence. And that's been so marked on

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1 the determination sheet.
2 However, there is no evidence that Mrs. Lacs was
3 a participant in the defendant's conduct or consented to the
4 act which caused her death.
5 There is no evidence that the defendant acted
6 under substantial duress, domination or provocation of another
7 person.
8 There is no evidence that the murder was
9 committed while the capacity of the defendant to appreciate
10 the criminality of his conduct or conform his conduct to the

requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance. There is no evidence the defendant was of a youthful age at the time of this crime. The evidence is that the defendant is a twenty-six year old man who had a child. There is no evidence that the defendant was not the sole proximate cause of the victim's death. There is no evidence that it is unlikely the defendant will engage in further criminal activity that would constitute a continuing threat to society. Dr. Johnson testified that lifers constitute better prisoners, there's better amenability while incarcerated. But Dr. Johnson also said he couldn't predict if the defendant, Kevin Wiggins, would fit in that estimation or that group.
Ladies and gentlemen, I submit to you that the

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only way we can be sure that Kevin Wiggins does not do to another person what he did to Florence Lacs is to impose --
MR. SCHLAICH: Objection.
THE COURT: Overruled.
MS. COFFIN: -- is to impose the death penalty.
Further, I submit to you that there is nothing that mitigates this offense. Does the mitigating circumstance outweigh the aggravating circumstance, the robbery, the facts? There is no sense to this crime. Florence Lacs had been kind.
MR. SCHLAICH: Objection.
MS. COFFIN: I'll watch your property for you.
MR. SCHLAICH: The objection is to saying Florence Lacs had been kind. There is no evidence --
THE COURT: Sustained.
MS. COFFIN: She watched the sheetrock for him and she let him into her home.

What happened next? Defendant knocks -- what happened next, Florence Lacs was knocked down, she was forced into a tub of water, her head was held under, and Black Flag was sprayed on her. Her skirt was hiked to her limbs. She had no underwear. She had no dignity.
For what? Jewelry. Then he sprayed Black Flag on her, as you would spray a bug or an animal. For what?
When you deliberate, consider this. Consider that Florence Lacs was a seventy-six year old woman who could

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offer no resistance to the defendant.
Consider the circumstances of the robbery. The defendant did not rob Florence Lacs so that he could provide food for his child, clothing for his child, food or clothing for he and his girlfriend, Geraldine Armstrong. No. Jewelry. Florence Lacs was murdered so that Kevin Wiggins could buy jewelry for Geraldine Armstrong and himself.
When you deliberate, ladies and gentlemen, imagine Florence Lacs in that house. Imagine spraying that Black Flag on her in that condition. What kind of a man does that?
When you balance the aggravating circumstance against the mitigating circumstance by a preponderance of the evidence, I submit to you that your only sentence can be death. Thank you very much.
MR. SCHLAICH: Your Honor, may we approach the bench just briefly, please?
THE COURT: Yes.
(Counsel and the defendant approached the bench and the following ensued:)
MR. SCHLAICH: Your Honor, I did not object to one point that arose several times on the State's closing, and

23 I did want to note an objection before it is lost. Repeatedly
24 the State noted that the weighing process is one of being by a
25 preponderance, and we in our instructions as asked and in our

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1 proposed findings and determination form take the position
2 that the constitutional standard should be beyond a reasonable
3 doubt. And we wanted to note an objection to that.
4 THE COURT: Okay. Overruled.
5 (Counsel and the defendant returned to the trial
6 tables.)
7 THE COURT: Mr. Schlaich?
8 MR. SCHLAICH: Good morning, ladies and
9 gentlemen. Ladies and gentlemen, in the year 2100 BC, a king
10 in the Middle East wrote a book to his son who was to succeed
11 him on the throne about how to mete out punishment on the
12 people of his kingdom in a just way. And he said: Do
13 justice, that you may live long upon earth. Calm the weeper.
14 Do not oust a man from his father's property. Do not degrade
15 magnates from their seats. Beware of punishing wrongfully.
16 Do not kill, for it will not profit you.
17 Now, I ask you how far has justice come in 4,000
18 years? Today you sit here trying to decide a rightful
19 punishment. You sit here trying to decide if the execution of
20 Kevin Wiggins will profit us as a society. Whether Kevin
21 Wiggins lives or dies is why you are here.
22 The State in its opening said you are here
23 because Florence Lacs died. That is wrong. Florence Lacs did
24 die a tragic death, and you should grieve for her. That is
25 not why you are here.

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1 You are here because our society chooses to say
2 execution may be an appropriate punishment in a small number
3 of cases, and it is your role to represent our society in
4 determining whether this case is one of those cases.
5 You are under no obligation to impose death. It
6 is not mandatory. It is never mandatory. The only mandatory
7 thing here is that you consider all of the evidence, follow
8 the law, follow your conscience, and follow your morals.
9 I submit to you that when you do just that, you
10 will reach a stunning conclusion, which is that you can't be
11 sure beyond a reasonable doubt that Kevin Wiggins had any role
12 at all in the murder of Ms. Lacs. But I remind you that he
13 has been convicted. You cannot change that. He will go to
14 prison for a minimum of life because of that conviction.
15 However, when you reach the conclusion I submit
16 you will, it still has vital importance. Because if you can't
17 be sure that Kevin Wiggins had any role in Ms. Lacs' death,
18 you cannot possibly find that the State has convinced you
19 beyond a reasonable doubt that he was the principal in the
20 first degree in her murder.
21 Which means if Florence Lacs did indeed die by
22 drowning, and I suggest that medically it is equally possible
23 that she had a heart attack, but assume that it is correct
24 that she died by drowning, if she did, the question you have
25 to decide beyond a reasonable doubt is did Kevin Wiggins

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1 personally put her in the water, and did he personally hold
2 her there or keep her there until she drowned. That's what
3 principal means in a death penalty case.
4 Isn't it at least reasonably possible, if not

highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins? The evidence must cause you to answer this question yes.

What is the evidence? Well, I've made a chart here. I know the writing is kind of small, but there was a lot to put on. I hope that you can see it. I want to start with the things that are not in dispute, and what I've done is put the things not in dispute up there in black.

On Thursday, September 15th at 4:10, Florence Lacs drops Ms. Elgert off and presumably goes home. At approximately 5 o'clock, Chianti Thomas and Chentell Greewood see her in the hallway. A man thanks her for watching his sheetrock, and Ms. Lacs goes into her apartment. Both girls agree the man goes out.

You have also hear that 4:45, immediately before this, Kevin was told by his employer, the painters, to leave for the day and that he did. You also know that twenty minutes later, which would be 5:05, he comes back and he says he moved the sheetrock that was outside to the inside of the building. And in fact, he did do that.

At 7:30 he arrives at Geraldine Armstrong's house

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and he has the car and he has the cards. They use the cards Thursday. They use the cards Friday. They pawn the ring on Saturday. We're up to the 17th now.

We also know that on Saturday, Ms. Lacs does not appear for her card game and the police are called. We know that she's found on Saturday at 4 p.m. She is in a tub, not submerged. She's in a tub half full of water. The tub water has Black Flag in it. Her underwear is not on and there is underwear in the hamper.

At 9 p.m., Dr. Felsenberg, the Deputy County

Medical Examiner, sees the body, notes that rigor is present and notes nothing unusual about any temperature samplings in either the air or the water at that point.

We know that the following morning, Sunday, the 18th, at 9 a.m., Dr. Korell does her autopsy. At that point rigor is gone, lividity is fixed, and there is one bruise that she says is consistent with a struggle.

We know that on the 19th Kevin is still using the Citgo credit card because he used it that day. And on the 21st, he gets arrested in Ms. Lacs' car. And with him are Geraldine and the baby.

We also know some other things that don't fit exactly on the time line, but they're very important. There are seven prints. Two match the cops. Five don't match the cops. They come from interesting places, a door arch, an

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inside of the front door, and a soap box that's on the table.

We know they're not Kevin Wiggins fingerprints and we know that they are not able to match up even one similarity point between any of these five prints and Ms. Lacs.

We also know that found on the floor just inside her front door is the Ryder baseball hat that's in evidence.

We also know without dispute that Kevin Wiggins had no access to the keys to any of these apartments.

We also know that efforts were made to put -- to show that this hat was sold in a place that Kevin Wiggins had been to or to find someone that could put it on his head in any of these places or in his possession. And that was not done.

Now, what evidence is in dispute? By in dispute I mean either that questions were asked about it or there were

17 conflicting opinions, things like that. I filled that in in
18 red.
19 First of all, the clothing on Ms. Lacs. Well,
20 Ms. Elgert says it is a white shirt and light blue skirt. She
21 showed you the color in her dress, what light blue meant to
22 her. Chentell says she was wearing, when she saw her at 5
23 o'clock, a red skirt and a white shirt.
24 Some of the ladies that the police officer talked
25 to on Saturday said that when they saw Ms. Lacs on Thursday

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1 she was wearing a red dress.
2 On Friday at approximately 10 a.m., Ms. Vassar
3 takes a phone call from the person she knows to be Ms. Lacs.
4 Dr. Korell, the State's witness, testifies that
5 her time of death was -- was a minimum of twenty-four hours
6 and a maximum of forty-eight hours from when Dr. Felsenberg
7 made his notes. That means twenty-four hours back from 9 p.m.
8 Saturday, which is 9 p.m. Friday, to forty-eight hours back,
9 which is 9 p.m. Thursday.
10 Now, I would say that's in dispute for two
11 reasons. One, Dr. Comparini testifies a little differently,
12 but Dr. Korell originally concluded that Mrs. Lacs died on
13 Friday. And that's what she puts in the death certificate.
14 That's in evidence. Dr. Dixon testifies that her range is
15 exactly the same as what Dr. Korell reached. Hers must be
16 somewhat in dispute because the State brings her in as a
17 consultant and never even tells her that there was somebody
18 that said they talked to her alive on Friday. And that would
19 have been important to her to know in reaching her opinion.
20 We have produced Dr. Comparini. She has
21 testified that based on her examination and a thorough supply
22 of information about this case that she recited for you, she

23 would place the range of time of death from twenty-four hours
24 from the time the autopsy was done, which is 9 a.m. Sunday, to
25 thirty-six hours before that time. So we are are talking

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1 about twenty-four hours back, which is 9 a.m. Saturday, to
2 thirty-six hours back, which is 9 p.m. Friday. That's her
3 range.
4 Now, when you put all this together, what does it
5 mean? Well, you take this evidence, ladies and gentlemen, and
6 it reminds me of the saying, which is that, yes, Justice wears
7 a blindfold, but that does not hold her tears. Because the
8 evidence is staring at you and telling you that something is
9 very wrong with the State's case.
10 Ms. Vassar, Dr. Korell, Dr. Dixon, and Dr.
11 Comparini all support the conclusion that when Kevin Wiggins
12 had Mrs. Lacs' car and her credit cards at 7:30 Thursday
13 night, she was still alive.
14 The clothes Ms. Lacs was found in, you will see
15 the picture. It is in evidence. You have looked at it
16 already. I submit to you that that is a white blouse and a
17 teal skirt. Detective Crabbs has described it as a green
18 skirt. The one thing that I would say to you is it is
19 certainly not red, which two people at least said is what she
20 was wearing Thursday. And in Van Gogh's wildest manic
21 nightmare, this cannot be described as a light blue.
22 So if it is not what the two girls say she's
23 wearing Thursday, it is not what Ms. Elgert says she's wearing
24 Thursday, I suggest to you what she has on when she's found
25 dead were Friday's clothes.

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1 The fingerprints left behind in Ms. Lacs'
2 apartments are the killers. That's why they're there, and in
3 particular, the fingerprints that are on that soap box. You
4 see the pictures. You see how things have been moved around.
5 You see in those pictures the cleaning supplies pulled out of
6 the closet, placed on the floor, things stacked on the table.
7 One of the things stacked on the table is the soap box the
8 fingerprints came off of.
9 Who touched it? Who moved it? The killer did.
10 And that fingerprint is not Kevin's. What do these pieces of
11 evidence lead you to conclude? That Kevin Wiggins did not
12 murder Ms. Lacs to acquire her property.
13 This conclusion can be reinforced with some other
14 things you should consider. There is Black Flag in the water.
15 Let's assume that it is there because it was sprayed on Ms.
16 Lacs' body like the State tells you.
17 In their opening and again in their closing, they
18 pointed out to you how bizarre that was. What reason for that
19 is there? It is sick. They ask you, is there anything that
20 you know from this evidence about Kevin Wiggins that leads you
21 to conclude he is a bizarre person like that? Read that
22 pretrial investigation that the State put into evidence.
23 There is not one thing in there that would lead you to
24 conclude that Kevin Wiggins is this kind of a person.
25 Second, is there any reason to believe that a

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1 twenty-seven year old man with no prior record, not only no
2 prior record of a crime of violence, but no prior record at
3 all, nothing, who tries to work, who tries to keep a place to
4 live, would start his criminal career by murdering an elderly

5 woman for her orangish Chevette and her credit cards? The
6 answer to that is no.
7 If Kevin had murdered Mrs. Lacs for the car and
8 the credit cards, would he continue to use them six days later
9 on the 19th -- the 21st, rather? He is still using the car
10 when he gets caught. Would he be waiting to get caught with
11 items that will lead back to a murder? No.
12 But if he acquired those cards and that car
13 through some illicit source, admittedly illegal source other
14 than having murdered her for them, and if he knew nothing
15 about the fact that she was murdered to get these things,
16 would he continue to use them? I would say to you it is quite
17 likely that he would do that. Why be in fear?
18 Now, at this point I have to predict for you what
19 the State's response to the things I've said is going to be,
20 because they get to follow this up. They'll say believe
21 everything Ms. Vassar tells you about the cards and the keys,
22 but don't believe what she tells you about the phone call on
23 Friday, because she's mistaken. I don't see how they can draw
24 that distinction to begin with, but, okay.
25 But I ask you, why believe she's mistaken? She

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1 didn't seem feeble when she took the stand. She walks. She
2 can hear. She can see. She displayed true certainty to you
3 when she told you she talked to her friend on Friday.
4 The State says to you, she's mistaken because
5 there is nothing unusual about that conversation. But she
6 testified that she found out her friend had been murdered on
7 Saturday, and she told the cops on Saturday, one day later,
8 that she had talked to her friend on Friday. It is not a
9 question of whether she's mistaken a year later. She told
10 them this one day later. And she has remained sure of it ever

since.
And the other interesting thing about it is that
her 10 a.m. phone call on Friday fits not only the defense
medical testimony that says Ms. Lacs didn't die until 9
o'clock Friday night, it fits the State's testimony, which
says she may well not have died until 9 o'clock Friday night.
Yes, Ms. Vassar did talk to her alive on the phone Friday.
The State will tell you that Ms. Lacs must have
died Thursday because her TV Guide was bookmarked for that
page. You have heard the testimony which was that the
detective could not recall whether there were any markings,
that is, written markings in the book for the 15th. So you
can't really draw any conclusions from that.
If the State argues that you can, keep one thing
in mind, this detective took pictures. He took boxes of

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evidence. There were things in evidence that he tracks down
for weeks. He took a detailed description of every inch of
that apartment that he gave from the stand, but he didn't
seize the TV Guide. Don't let anybody stand here and try to
argue to you what that TV Guide contained. You will never
know. Which is why he told you he couldn't remember.
Now, the State is going to argue to you that
Kevin Wiggins did this murder during this span of time from
when he left the maintenance office at 4:45 and came back at
5:05, twenty minutes that Mr. Weinberg testified Kevin was
gone.
Now, we know that it took him five minutes to
walk to there and five minutes to walk back. That leaves ten.
We know that he did move the sheetrock, like he said he did.
That took some time. We know that he talked to Mrs. Lacs. We
know that he went back outside when the little girls left. He

was going outside with them. That took at least some moments
in time.
You can see the picture. Somebody ransacked
every inch of Mrs. Lacs' apartment. That was not accomplished
in the remaining seven or eight minutes that Kevin Wiggins was
over in that apartment building.
And what I really can't figure out is, if you
would kill someone at that time, why would you go back and
tell somebody, I was just -- if anybody turns up dead, I was

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there. What possible sense does that make? The State is
arguing to you that this is some kind of new alibi or
something, put yourself there, that way you can't possibly be
a suspect.
Ladies and gentlemen, Kevin Wiggins went and
moved the sheetrock because he thought he was doing something
nice for a new employer, and he needed a job. And he did it.
He did what he said he did.
They say to you, and have in their closing and
undoubtedly will in the rebuttal, state to you that he killed
Ms. Lacs obviously because he lied in his statement. This is
a stretch of the first degree.
Kevin committed and confessed to theft and credit
card offenses. He was not asked about murder. He was not
told he was being held for a murder. And he said nothing
about a murder. The most plausible explanation for why he
lied at all about the date or the time or the manner in which
he got the car and the cards is that he was covering for the
person that provided them to him. That's why.
They'll tell you that Kevin is a criminal type
because remember when they arrested him and booked him, they
found a glove in his pocket. But we know by agreement that

none of the substances spilled in that apartment, either on Ms. Lacs or in that bathtub, were found on that glove. There are fingerprints in that apartment, which would lead one to

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conclude, I would think, that the killer of Ms. Lacs was not wearing gloves.
And even stronger on that point, you have heard that the place was wiped down. You don't put on gloves and then wipe down the fingerprints you didn't leave. You try to wipe down fingerprints you are afraid you did leave because you are not wearing gloves. Don't let the State stretch that one.
In short, ladies and gentlemen, they'll be telling you when you hear rebuttal, believe what they say and don't believe what they show you. The end result of their analysis must be that you cannot be certain beyond a reasonable doubt that Kevin is the principal in Ms. Lacs' murder, and you must be sure.
I submit to you that mistakes have been made in this country in the past, and innocent men have been executed in this country in the past. Some of you may remember that there was a hit movie approximately a year ago about that very thing happening, a true story. And that the man that was the subject of that movie came perilously close to dying in an execution chamber for a crime that he was cleared of.
I say to you that when you go home tonight, be sure that your conscience will allow you to go to sleep peacefully, and that that peaceful sleep and quiet conscience will continue tonight, next month, next year, and forever.

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It has been said that there is one thing alone that stands the brunt of life throughout its course, a quiet conscience. If these facts nag your conscience, quiet it by voting for life.
Let me close by saying just a few things.
Closing arguments in a case like this are very difficult, because the defense only gets one chance to address you. And in that, we have to respond to what the State has said. We have to put forth our position, and we have to predict for you and respond to what we think the State will say in rebuttal, because they now get to speak to you. And theirs is the last voice that you will hear from the lawyers in this case.
But when you go back to the jury room to deliberate, please let my voice be heard in your mind. Listen for the things I have said. Remember my voice, and remember and hear my plea to your conscience.
And there is one other reason why it is so hard for defense attorneys to do this. You think to yourself when you stand before the twelve who decide your client's fate, what do you say to argue for life for a person who didn't commit the crime. Thank you.

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MS. BROBST: Thank you, your Honor. May it please the Court, Madam Forelady, members of the jury, I would like to reiterate Ms. Coffin's statements to you. We do very much appreciate your agreeing to undertake the job which you have agreed to do.
I would also like to reiterate another thing she said to you. Probably the most important thing you brought

24 into the courtroom over the last week and especially today and
25 later on today is your common sense. I think you are going to

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1 find that's an important thing you all have and something you
2 are going to have to use when you apply it to the evidence in
3 this case.
4 I would like first to talk about mitigation in
5 this case. We agree, as it has been told to you a number of
6 times, and the form is premarked, the defendant has not
7 previously been convicted of a crime of violence. That is a
8 mitigating circumstance. You must find that and you must
9 weigh that against the aggravating circumstance in this case,
10 which is the murder occurred in the course of a robbery.
11 I would also like to briefly touch on Professor
12 Johnson who touched on --
13 MR. SCHLAICH: Objection, your Honor.
14 THE COURT: Sustained. That's not rebuttal.
15 MS. BROBST: Thank you, your Honor. Addressing
16 specifically some of the points that the defense made in his
17 closing remarks to you, when he said that it was illogical or
18 irrational that someone would murder someone in this fashion
19 for the few things that were obtained, the credit cards, the
20 orangish Chevette as it was referred to.
21 I would like to point out this was a crime of
22 opportunity. Mrs. Lacs was brutally murdered because the
23 defendant had the opportunity to do so, because she was
24 available to him as a victim.
25 And the reason that all that was obtained as a

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1 result of this brutal crime were a few credit cards, the keys

2 to an orangish Chevette, and an engagement ring which she
3 owned, because that's all Mrs. Lacs had of value.
4 Additionally, because the defendant committed
5 this murder alone, none of the larger items such as the
6 television set could have been removed and concealed on his
7 person when he left that apartment. It was stated that
8 perhaps this defendant is covering up for someone else. Why
9 would he still be driving that car on the 21st?
10 Well, the car was stolen during a murder. That
11 is simply true. If the defendant were covering for someone
12 else, the car was no less stolen in the murder, and the fact
13 he is still driving it on the 21st does not indicate he isn't
14 guilty of this offense.
15 In addition, I would like to point out that Mrs.
16 Lacs was a widow. She lived alone. There was no way the
17 defendant could have known that she had even been found at
18 that time. She could have still been alone, lingering in the
19 apartment in the tub by the 21st. There was no way that
20 anyone could have known that that was no longer the case.
21 Now, the defense counsel has also asked you to be
22 able to live with this decision, and I hope that you will be
23 able to live with this decision, but, you know, somebody
24 else's life was at stake in this case. And I would like to
25 just bring up Florence Lacs for a moment, and ask you to also

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1 consider her, her life, and her unnecessary --
2 MR. SCHLAICH: Objection.
3 THE COURT: Overruled.
4 MS. BROBST: -- and really meaningless death when
5 you deliberate. And consider her as well as the defendant,
6 who you should also consider.
7 Now, when you all came to court last Thursday

8 knowing that you had been asked to sit this month as jurors,
9 you didn't ask to make this decision. You didn't hope that
10 you would be selected for this jury. But you agreed to do so.
11 You agreed to do your civic duty in this case and you accepted
12 this responsibility.
13 Now, your responsibility in this case is to look
14 at the evidence and to follow the judge's instructions, and to
15 reach a just verdict based on the law and the evidence.
16 That's what your responsibility is in this case. And give it,
17 if you would, please, your careful consideration.
18 Now, when you do retire to deliberate, which you
19 will do in just a few minutes, I would ask you to use the form
20 and start at the beginning. And start with Section I,
21 question number 1 as a way to get started on making this
22 important decision, realizing as you do that the defendant has
23 been convicted of first degree murder and robbery.
24 And to reiterate what Ms. Coffin said, your
25 decision is to decide whether in the first instance he is a

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1 principal in the first degree, whether it was he who caused
2 her death.
3 Then to go on to consider whether the death
4 occurred in the course of a robbery, which she explained to
5 you. Now, the defense on this point mentioned the
6 fingerprints, the five fingerprints which the Baltimore County
7 Crime Lab was unable to identify. Please recall that
8 testimony. It was the testimony of Detective-Sergeant Butt,
9 who stated that those prints were not identified to anyone
10 whose prints were submitted. Now, that includes Mrs. Lacs.
11 Now, we know for a fact that Mrs. Lacs was in
12 that apartment. So the fact that the prints were not
13 identified doesn't mean that they weren't someone's who was

14 there, specifically Mrs. Lacs' prints.
15 Additionally, the defendant was apprehended with
16 a glove in his pocket. One of the detectives testified that
17 there were marks in the apartment with water dots, such as you
18 would find if you removed a glass from a dishwasher. I think
19 that's very important when you consider there were also wet
20 towels found at various inconsistent places in the apartment
21 and the fact that the defendant was apprehended with a glove.
22 The defendant had the opportunity. The defendant
23 had the property. And he is seen in the hallway with Mrs.
24 Lacs the last time that she is seen alive by anyone other than
25 the defendant.

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1 Now, again, we don't know exactly what happened
2 or in what order. We do know that she is alive around five,
3 and by 7:30 p.m., he has her property. Sometime between then,
4 between those two times, she is murdered by the defendant and
5 we know it is him because he knows to lie later about the
6 date, when he is apprehended in that car, and offers his
7 so-called innocent explanation for how he came across the car
8 The medical evidence in this case, if I may characterize it
9 for you, from the defense expert, Dr.
10 Comparini, was at thirty-six hours certain things had taken
11 place. Rigor mortis has dissipated and livor is set. But she
12 told you that that continues, that continues in time until two
13 or three days, at one time she testified. And your
14 recollection of the testimony controls, but she said sometimes
15 toward the end of the week, that those two things remain
16 constant.
17 We can't tell from the medical testimony alone
18 when Mrs. Lacs was murdered by the defendant. We have to use
19 our common sense and look at the things that we do know, the

20 black notations that Mr. Schlaich drew for you, the things
21 that we know for sure. And the most compelling of those
22 things is that she has her things late that afternoon, she has
23 her keys, her credit cards, and she is in her apartment. And
24 by 7:30, 8 o'clock that night she doesn't have them and the
25 defendant does.

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1 And on that point, obviously these things were
2 taken from her. They were taken from her purse and her
3 wallet. Detective Crabbs testified that that purse and wallet
4 were on this bed, this bed and this apartment. On Thursday
5 before 7:30, when someone else has this property, when someone
6 else has the car, and the credit cards, and the car keys, and
7 the engagement ring, it looked like this.
8 Now, Mrs. Lacs did not go to bed that night after
9 this had been done to her apartment to be killed sometime
10 later in the week. That didn't happen. When the property was
11 stolen, and this is what happened when that property was
12 stolen, her apartment was tossed. It was ransacked.
13 And the reason that we know Mrs. Vassar is
14 mistaken about that phone call is Mrs. Lacs didn't get up the
15 next morning and call her and say, how are you doing, I've got
16 to go back to the store, not after this had been done to her
17 apartment. That is just inconceivable. People just don't
18 live this way, with their apartment in this condition. And
19 when the apartment got in this condition, because of the
20 robbery, when the property was taken, this was done.
21 When you make your decision in this case, you are
22 going to be asked whether the aggravating circumstance in this
23 case, the fact of the robbery, outweighs the mitigating
24 circumstance, which is that he doesn't have a prior conviction
25 for a crime of violence. And what the State is asking you to

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1 do is decide what is the appropriate sentence for what he did.
2 We're asking you to consider his crime. Look at
3 what he did. And when you weigh that in this case against
4 what you know about his background, the appropriate sentence
5 is death. Thank you very much.
6 MR. SCHLAICH: One second please, your Honor.
7 THE COURT: Ladies and gentlemen, at this time,
8 the defendant, Mr. Wiggins, will exercise his right of
9 allocution. Mr. Wiggins?
10 THE DEFENDANT: Ladies and gentlemen of the jury,
11 it has been hard for me to know what to say to you. I don't
12 know how to plead for my life.
13 I am sorry about what happened to Ms. Lacs and I
14 feel for her and her family. But I did not kill her. I
15 should not have used the things that did not belong to me
16 because I know that was wrong, and I am ready to go to jail
17 for that.
18 I am so upset right now about what is happening.
19 I don't know if they were right about this, my lawyers, wanted
20 me to get up and speak, but I've been going through a lot at
21 the Detention Center, and I'm just really upset.
22 But I do say this. I did not murder Ms. Lacs. I
23 can't believe that the State wants you to give me the death
24 penalty. And they laugh about it in the courtroom. It makes
25 me feel like my life means nothing.

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1 I am not a troublemaker, and I don't hurt people,
2 and have no convictions. I have tried to keep a job and a
3 place to live, but that has not been easy for me because I
4 haven't finished school. And everywhere I go they ask for a

5 degree in this and a degree in that, and I don't have it. And
6 I had to come out of school because I had to support myself
7 because my mother left me on the doorstep.
8 I would just like to thank you for listening to
9 me, and I would like to thank Carl and Michele Nethercott for
10 respecting me and believing me, and hanging in there with me
11 because I have been given a hard time because I've been going
12 through a lot. Thank you.

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3 (Whereupon, the jury began deliberations at 12:24
4 p.m.)
5 (Discussion had off the record.)
6 (The jury returned to the courtroom at 6:38 p.m.
7 and the following ensued:)
8 THE COURT: Ladies and gentlemen of the jury,
9 have you reached a verdict?
10 THE FORELADY: Yes, sir, we have.
11 THE COURT: Who shall say for you?
12 THE FORELADY: I shall.
13 THE COURT: And, Madam Forelady, how say you with
14 respect to Section I, whether the Defendant was a principal in
15 the first degree to murder, do you find that proven or not
16 proven?
17 THE FORELADY: Proven.
18 THE COURT: I'm sorry?
19 THE FORELADY: Proven.
20 THE COURT: And as to Section II, how do you find
21 with respect to whether the Defendant committed the murder
22 while committing or attempting to commit robbery, proven or
23 not proven?
24 THE FORELADY: Proven.

25 THE COURT: And as to Section III, Item 2,

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1 mitigating circumstance, 2, how do you find as to (a), (b) or
2 (c)?
3 THE FORELADY: (b).
4 THE COURT: As to 3, (a), (b) or (c)?
5 THE FORELADY: (b).
6 THE COURT: As to 4, (a), (b) or (c)?
7 THE FORELADY: (b).
8 THE COURT: And as to 5?
9 THE FORELADY: (b).
10 THE COURT: And as to 6?
11 THE FORELADY: (b).
12 THE COURT: As to 7?
13 THE FORELADY: (b).
14 THE COURT: And as to 8(a)?
15 THE FORELADY: No answer.
16 THE COURT: As to 8(b)?
17 THE FORELADY: His background.
18 THE COURT: As to Section V, how do you find, yes
19 or no?
20 THE CLERK: It's IV, Judge.
21 THE COURT: And whether the State has proven by
22 a preponderance of the evidence the aggravating circumstance
23 marked proven in Section II outweigh the mitigating
24 circumstance in Section III?
25 THE FORELADY: Yes.

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1 THE COURT: As to Section V?
2 THE FORELADY: We unanimously determine the

3 sentence to be death.

* * * *

In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
(Post Conviction Hearing)
January 7, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

* * * *

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19 Mr. Siegel: [WITNESS: HANS SELVOG]
20 Q Mr. Selvog, what is your profession?
21 A I'm a licensed clinical social worker.
22 Q I'm showing you what -- Your Honor, I don't know
23 what system you wanted to use here.
24 THE COURT: Mark them in and do them in
25 sequential numbers.

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1 MR. SIEGEL: Could I recommend that we perhaps
2 use the letters P C before each number or letter to identify
3 that that is a post conviction proceeding?
4 THE COURT: That will be fine.
5 MR. SIEGEL:
6 Q Giving you what I have marked as PC-1, Mr.
7 Selvog, do you recognize that?

8 A Yes.
9 Q What is PC-1?
10 A This is my resume'.
11 Q Now, Mr. Selvog, you mentioned a moment ago you
12 were a certified licensed social worker. When did you become
13 certified and licensed?
14 A In 1990.
15 Q How does one become certified and licensed as a
16 social worker?
17 A Following a graduate degree in social work you
18 have to have two years of weekly supervision that is -
19 documented and that can be presented to the State licensing
20 board and then pass an oral examination, written examination
21 and then the state office assigns you a license.
22 Q Okay. Can you give us your educational
23 background?
24 A I have a Bachelor's Degree in social work, in
25 1976, and a graduate degree in social work in 1986.

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1 Q Okay. From where are those degrees?
2 A The first one from Bethel College in Saint Paul,
3 Minnesota and the second was Virginia Commonwealth University
4 in Richmond.
5 Q What is your current position?
6 A I'm on staff with the National Center on
7 Institutions and Alternatives where I'm one of the primary
8 therapists there and do a number of the forensic clinical
9 assessments out of the office.
10 Q Can you for starters describe the National
11 Center on Institutions and Alternatives for the Court?
12 A We are a private nonprofit agency that provides
13 direct services to both the criminal justice and mental health

14 systems. I primarily have been involved in providing services
15 in forensic social work. I ran our office as the
16 administrator in Atlanta for three years and then have been
17 here in northern Virginia since 1989 under my new duties.
18 Q What did you do down in Atlanta specifically?
19 A I ran the office, which comprised mainly of
20 providing alternative sentencing cases to the courts in felony
21 cases and also provided social histories in capital cases and
22 we also received a grant in my office there to act as a
23 clearing house on mitigation development in capital murder
24 trials.
25 Q Okay. And now that you work in Alexandria, do

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1 you work on specific cases there?
2 A Yes, I do.
3 Q Could you describe that work?
4 A We primarily work with felony defendants
5 fashioning alternative sentences and also providing
6 corroborative social histories in capital cases and also
7 providing direct therapy to victims of sexual trauma and
8 perpetraitors of sexual abuse.
9 Q What sort of work did you do before your
10 position at NCIA?
11 A I have experience as a substance abuse counselor
12 for the chronically -- chronic cases in Saint Paul, Minnesota.
13 I have done a lot of work with juvenile delinquents in the
14 states of Minnesota, Illinois and Virginia. Also worked with
15 the chronically mentally ill in Virginia, people from --
16 people with problems from schizophrenics to bi-polar
17 disorders. And I also have done a variety of individual and
18 group therapies with teenagers and their families.
19 Q Now, specifically, Mr. Selvog, have you done any

investigative work into defendants or petitioners' backgrounds in capital cases?
A Yes, I have.
Q And could you describe that work for us?
A Since 1986 I began preparing and compiling social histories for defendants in capital cases for the

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defense. I'm usually appointed through the courts to provide these extensive investigations and I detail the results of my interviews with the defendant and his family and after researching the records into a report that are submitted to the court.
Q Do you also attend or conduct any seminars on this sort of work; keep abreast of the educational developments?
A Yes, since my office in Atlanta in running the clearing house there I was invited in 1988 to speak on mitigation development at the Airlie House conference in Warrenton Virginia, which is an annual conference put on by the NAACP. I also have presented this information for continuing legal education seminars in the states of Louisiana and Virginia.
Q Okay. Mr. Selvog, do you have any clinical experience with victims of abuse?
A Yes, since 1989 I have been assistant administrator and one of the primary therapists in the Augustus Institute, which is a direct mental health out-patient mental health clinic of the NCIA and our predominant population that we deal with are victims of sexual trauma and perpetraitors of sexual abuse.
Q Could you discuss a little more specifically your clinical experience with these victims of sexual abuse

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that you just mentioned?
A Well, primarily we help people who have suffered sexual abuse in traumas, both victims who are trying to repair their lives -- we do extensive therapy both individually and group and also perpetrators who 90 percent of them have also been sexually victimized, and we deal with their victimization and acting out behaviors and try to prevent recidivism in those cases and try to repair those lives as well.
Q Have you ever been admitted as an expert, Mr. Selvog?
A Yes, I have, I have qualified as an expert in the area of social work in capital cases approximately ten occasions in both the state and federal level.
Q Any experience in Maryland as an expert?
A Yes, I have been qualified in Maryland approximately six cases.
Q Could you give us the range chronologically, the first case to the last case?
A Beginning in 1989 to the present is when I have been qualified as an expert in Maryland.
Q So those six cases were in Maryland?
A Yes.
Q And what field exactly were you qualified as an expert?
A In the field of social work.

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MR. SIEGEL: Your Honor, at this time I move to admit Mr. Selvog in the field of social work.
THE COURT: Any questions?
CROSS EXAMINATION (On qualifications)

MS. BROBST:
Q You have stated that your degrees are a Bachelor's Degree in social work and Masters in social work, is that correct?
A That's correct.
Q You do not have a medical degree, is that correct?
A Yes.
Q You are not a psychiatrist?
A No.
Q Nor are you a psychologist.
A No.
Q Is it your understanding that someone with a Bachelor's Degree in social work and masters in social work, is that correct?
A That's correct.
Q You do not have a medical degree, is that correct?
A Yes.
Q You are not a psychiatrist?
A No.

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Q Nor are you a psychologist.
degree with a Masters and Bachelor's in social work may diagnose?
A Yes.
Q That is your understanding?
A That --
Q You may opine as to a diagnosis?
A Yes, if you are licensed clinical social worker you may.
Q What kind of a diagnosis can a licensed clinical

social worker opine as to?
A A diagnosis in terms of what disorder, medical disorder a patient my be suffering from.
Q You could state that someone was suffering from schizophrenia?
A Yes, I could. That is the purpose of a license in order to submit to insurances for payment. That is the whole purpose of it. That is one of the purposes of the license.
Q So I'm now given to understand that a licensed clinical social worker -- are you licensed in the State of Maryland?
A No, I'm not.
Q Where are you licensed?
A Virginia and Washington, D.C..

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Q Is it your understanding that a licensed clinical social worker in the State of Maryland can diagnose someone's mental disorder?
A I can't say for sure in the State of Maryland.
Q You have no knowledge of that?
A I would -- I just can't state for sure. I would assume that you would; that it would be the same in each state.
Q It is your testimony that you can in Virginia?
A Yes.
Q Are you considered an expert in the area of psychological testing; can you administer IQ tests?
A No, I cannot.
Q How about those Rorhschack test?
A No, I cannot.
Q Wouldn't be it be more accurate to state that

17 actually your experience would be that of collecting
18 information regarding somebody's background?
19 A That is an accurate statement, yes.
20 MS. BROBST: Nothing further as to
21 qualifications, Your Honor. I may have objections as to
22 various opinions as they come up.
23 THE COURT: Well, my recollection of the law is
24 that he is absolutely not allowed under Maryland law to
25 express any type of diagnosis as far as anything involving DSM

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1 III or anything along there. So I don't think it is any big
2 surprise at this time what objection you will make.
3 MS. BROBST: Thank you.
4 THE COURT: How many years of education do you
5 have? Four years of college?
6 THE WITNESS: Four years undergraduate and two
7 years graduate.
8 THE COURT: What kind of courses did you take in
9 graduate school?
10 THE WITNESS: A whole range from the clinical
11 diagnoses --
12 THE COURT: You never took any pharmacology?
13 THE WITNESS: No, sir.
14 THE COURT: So you don't know anything about
15 drugs?
16 THE WITNESS: That's correct.
17 THE COURT: What did you take in college and what
18 do you feel should allow you to express an opinion as to a
19 diagnosis of a psychological or psychiatric condition?
20 THE WITNESS: The license requirements, in order
21 to become a licensed clinical social worker, that is one of
22 the minimum requirements tested for is your knowledge in order

23 to make these appropriate --
24 THE COURT: What courses did you take? Do they
25 allow you to express that opinion in the State of Virginia?

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1 THE WITNESS: Yes, if I wish to they will allow
2 me to make a diagnosis.
3 THE COURT: Gentlemen, did you call him to
4 express any type of psychological or psychiatric opinion in
5 this case?
6 MR. SIEGEL: No.
7 THE COURT: That takes care of it then. We don't
8 have to worry about it. Go ahead.
9 MR. SIEGEL: He has been admitted then?
10 THE COURT: He has been admitted. I certify him.
11 DIRECT EXAMINATION (Continued)
12 MR. SIEGEL:
13 Q Mr. Selvog, in that case, based on your
14 experience and expertise in investigative and mitigational
15 work in capital cases, what should capital case lawyers do
16 from the outset of a capital case with respect to that
17 defendant's background?
18 MS. BROBST: Objection.
19 THE COURT: Sustained. Ashley, find me in here
20 what Judge Hinkel found him guilty of in the green sheets.
21 Q Mr. Selvog, in this case what did we ask you to
22 do?
23 A You asked me to prepare a full corroborative
24 social history on the defendant that includes documented and
25 corroborated information through interviews about his life.

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Q Could you go into a little more detail on what exactly you did to comply with our request?
A Yes. What I did was interview the defendant, interview the many family members that we could locate about the defendant's life, reviewed records pertaining to the defendant which included his foster care records, medical records and school records.
Q Okay. And who exactly did you interview in this case with respect to the defendant?
A Interviewed the defendant, Kevin Wiggins on several occasions, his mother, his three sisters, his maternal aunt, maternal cousin and another maternal cousin.
Q Okay. What records exactly did you review?
A Primarily relied on the Maryland social service records and some of his medical records from Baltimore area hospitals.
Q Okay. And did that effort -- what did that effort culminate in?
A A report that I prepared, "Chronological merit of Kevin Wiggins Social History".
Q I'm showing what you I have marked as PC-2. Do you recognize that document?
A Yes, I do. This is the report that I prepared for you.
MR. SIEGEL: Your Honor, I move that we admit Mr.

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Selvog's report as exhibit PC-2.
MS. BROBST: Objection.
THE COURT: Well, in Maryland once she objects you need to tell me more about how he went about gathering

this information. In Federal Court you can just throw it all in and then cross examine him. We don't do that here.
MR. SIEGEL: Okay.
THE COURT: You need to tell me more, particularly if there is any conclusions here. Are there any conclusions in this report or is it just a factual summary?
Q Mr. Selvog, have you drawn any conclusions from your investigative work?
A Yes, I have concluded on --
MS. BROBST: Objection.
THE COURT: The answer is yes. Where are the conclusions in the report? What page are they on?
MR. SIEGEL: They are at the very end of the report on the last three pages, beginning with Page 22, I believe.
THE WITNESS: Page 24, summary of conclusions.
THE COURT: Do you have any objection to anything on page 24, Ms. Brobst? Seems to me that --
MS. BROBST: I object to the report of the U.S. Department of Justice, National Institute of Justice.
THE COURT: Well, you don't doubt that there is

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such a report, do you?
MS. BROBST: No, sir.
THE COURT: I understand that Maryland says that I'm supposed to take notice of governmental records. Since you don't object to I will overrule your objection. Anything on page 25?
MS. BROBST: I object to the what I consider to be diagnoses opinion in the first paragraph after the report to which the Court has overruled my objection, beginning with the "developmental problems" and concluding with "vulnerable

and tender years."
THE COURT: Well, you are certainly entitled to know the basis of that before he expresses an opinion. But it seems to me that he is able to do that as a licensed social worker. So we will put a note there about the basis.
MS. BROBST: I'm not really objecting to the basis in candor. I'm objecting to his qualifications to state that opinion.
THE COURT: I think a social worker can express opinions as to developmental problems. What is next?
MS. BROBST: The following paragraph. "Although intervention." On the same ground that he is not qualified.
THE COURT: Overruled.
MS. BROBST: I would object to the inclusion of Lloyd Demause's opinion, since I have no idea --

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THE COURT: Where is that?
MS. BROBST: The next paragraph which is quoted into the next page. I have no opportunity to cross examine Mr. Demause who wrote "The Universlity of Incest" and his conclusions contained therein.
THE COURT: Well, you know, you can find anybody today that will write and express an opinion about anything. My God. It is unbelievable. But I'm reading this and it doesn't seem to me to be anything more, Ms. Brobst, than what is generally recognized and what you can find written by a decent reporter for the Baltimore Sunpaper or the New York Times any day. What do you think about that?
MS. BROBST: I think, Your Honor, that my point is merely that it is unfair to introduce the opinions of others merely because this particular witness has contained them in his written report.

THE COURT: I understand that. What I'm saying to you is that this is "stuff" that is generally accepted and reported as being accepted in the community in the New York Times and the Baltimore Sunpaper and the Washington Post any day. So if that is all it is and it is nothing other than generalities, I think I will let it in. Overruled.
MS. BROBST: For the same reasons I object to the following paragraph regarding the opinions of Doctor Marie Fortune and her estimates contained in the report of Mr.

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Selvog. I have no opportunity to cross examine her. He is in effect introducing her opinion in his report. I don't think if it were his opinion he would be qualified to make such an opinion for those reasons.
THE COURT: That kind of worries me. That is getting to be something a little bit too specific. I need to know more from this gentleman before that comes in. Anything else?
MS. BROBST: I object to the last paragraph which begins on page 26 and concludes on page 27 regarding this witness' diagnosis of the defendant Kevin Wiggins with respect to --
THE COURT: I will hold that --
MS. BROBST: -- psychological damage.
THE COURT: -- until I hear some basis for that opinion.
MS. BROBST: Just so that we --
THE COURT: The rest of it is generalization which I think that I can say is what has been reported in our major newspapers and our major magazines and is generally accepted in the community and reported as such involving the trauma of abuse for individuals.

23 So I do not see anything in any of this that is
24 not generally reported and not generally accepted and not
25 generally portrayed in any of this. It seems to me that all

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1 of the media and the magazines and the writers are in general
2 opinion that this is so.
3 The only thing that I feel that you are correct on
4 is whoever this Marie Fortune is and what type of a doctor she
5 is, her statement that ninety percent of all sexual abuse
6 victims are victimized by somebody they know, I certainly
7 don't think that opinion should be able to be expressed
8 without some type of basis because I could get Donald Fortune
9 and Tony Fortune and Zeke Fortune to write another article
10 saying it is 10 percent or 15 percent. I don't mean to be
11 discourteous to anyone, but everybody knows everybody is
12 writing articles saying everything today. I don't know if
13 that is generally accepted.
14 Also, with respect to the conclusion here that
15 Kevin Wiggins bore the secrets of sexual victimization, I will
16 sustain the objection in that regard until I hear a basis that
17 would allow him to express that opinion.
18 With regard to the rest of it, it being "generally
19 accepted", it is in.
20 MS BROBST: Thank you.

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11 THE COURT: You know what the parameters are.
12 Except for those two points I have overruled her objection and
13 allowed everything in.
14 MR. SIEGEL: May I continue examining on his

15 basis for those conclusions, for example the fortune report?
16 THE COURT: Yes.
17 MR. SIEGEL:
18 Q Mr. Selvog, what is the basis for your
19 conclusion that you end up with on page 26 of your report that
20 Kevin Wiggins bore psychological and abuse scars into his
21 adulthood?
22 A The basis for those conclusions are or is the
23 evidence from my interview with his family and himself and the
24 documents from Social Services. Did you want a more specific
25 answer?

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1 Q Please.
2 A The family recalls consistently the abuse that
3 Kevin Wiggins and his sisters suffered from their mother,
4 neglect and abandonment that they remember as well as
5 documented in the social service records that transpired for
6 approximately the first five years of Mr. Wiggins' life and
7 then it documents his foster care history in a number of
8 evaluations, school reports that also document the various
9 symptoms of psychological trauma throughout his adolescence.
10 And that in effect is the basis for that opinion at page 26.
11 Q Okay. Now, in your work, your clinical work
12 with victims of sexual abuse, could you tell us exactly what
13 conclusions you generally derive as a professional in this
14 area from that work?
15 MS. BROBST: Objection.
16 THE COURT: I didn't understand that. Could you
17 ask him that again?
18 Q Mr. Selvog, could you more generally describe
19 your work as a clinical social worker with victims of sexual
20 abuse? Tell us what you do.

21 A People come in with symptoms or troubles. As a
22 therapist we do a social history, try to determine -- we
23 question them thoroughly on what they are experiencing and we
24 determine what symptoms are present and we determine what the
25 basis for those symptoms might be in order to alleviate those

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1 symptoms both short-term and long-term through accepted
2 individual therapy and group therapy practice.
3 Q Could you explain that practice a little bit?
4 What are those accepted practices that you just referred to?
5 A By providing a therapeutic relationship that
6 would allow someone to uncover history of trauma or abuse and
7 to talk about that, to work through those issues; to try to
8 resolve those experiences in a way that will not interrupt
9 their functioning; that they can have some resolution, some
10 finality to those damaging, developmental, abusive
11 experiences.
12 Q Okay. Could you contrast that work, if it is
13 different, with the work that is done by trained mental health
14 professionals, psychiatrists and psychologists?
15 A Well, social workers are also trained mental
16 health professionals. The difference between what a
17 psychiatrist and psychologist might do, from my opinion,
18 psychiatrist has a medical degree and can prescribe
19 medication; psychologists are licensed to test using objective
20 tests on clients. But essentially the therapy that goes on
21 between client and patient is very similar fundamentally among
22 social workers, psychologists and psychiatrists. The only
23 difference would be the particular model of therapy that they
24 use in their practice.
25 Q And for these victims of abuse that you counsel

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1 and work with in the way you have just described, do you
2 gather evidence from their past, their personal histories to
3 help you in this therapy?
4 A Yes, very similar to the same kind of process
5 that I described earlier about what I did in this case. We do
6 a very thorough social history which is probably the thing
7 that distinguishes social work profession from psychologists
8 and psychiatrists is doing -- it is the cornerstone of the
9 social work practice is the psycho-social history and being
10 able to assess someone's past and how it affects them today
11 and through that sort of process.
12 Q How long have you been counseling victims of
13 sexual abuse, Mr. Selvog?
14 A Since 1989.
15 Q As a rough estimate -- I know you don't have a
16 exact number here, but as a rough estimate how many victims
17 would you say you have worked with?
18 A A rough estimate would be one hundred and fifty
19 to two hundred.
20 Q Okay. And in the work that you have described
21 that you do on behalf of capital defendants and petitioners,
22 is this component, this therapy and personal history as
23 regards sexual abuse typically a component of it, of the work
24 you do and have done for capital defendants and petitioners?
25 A I would say yes, it is typically a component.

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1 MR. SIEGEL: Your Honor, I move that Mr. Selvog
2 at this time be admitted as an expert in social work as it
3 regards sexual abuse and its affects later in life.
4 THE COURT: Well, he already has been admitted

for that, sir. The question Ms. Brobst has is is he able considering his training to express the opinion that you wish him to express? Is it accepted in his profession that he be able to express that type of opinion? That is what she wants to know.
MR. SIEGEL: Okay.
Q Mr. Selvog, let's turn to the specific work you have done on behalf of Kevin Wiggins. You have already summarized your conclusions based on this work. Could you specifically tell me first of all when Kevin Wiggins was born?
A Kevin was born September 2nd, 1961 in Baltimore, Maryland.
Q Okay. And who were Kevin Wiggins' parents?
A His mother was Jean Wiggins. His father was Lester Evans, who was not married to Jean Wiggins but was -- it was an extra-marital affair that produced Kevin.
Q Did Kevin know his natural father?
A He knew of him but he really has never known him.
Q Okay. What sort of person then was Kevin Wiggins' mother?

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A She came from a family of five, I believe. She was an alcoholic, chronic alcoholic prior to the time Kevin was born up to the present.
Q Okay. What were the effects of this alcoholism on Jean Wiggins?
A The effects of her alcoholism as related to Kevin was that she did not provide adequate care to Kevin and his two older sisters; leaving them for days, sometimes weeks at a time. Before she left the apartment she would lock the kitchen so that the children couldn't get in to get food and

the children with the help of the oldest sister, India Evans, would have to beg for food from the neighbors, from relatives, pick food from trash cans, hide food in anticipation of the mother leaving the home to prepare later, which usually consisted of rice and milk and cereal.
And that when the mother did come home she was usually in a drunken state or very disheveled state so that she was not in the state of mind to provide adequate nurturing, often had company when she came home, was drunk with the company, put the children in another room while they had sex and partied in the next room. In fact the children recall being in the bed when Mrs. Wiggins had sex with some of her relationships as she brought home, witnessing that sex and also witnessing her mother's nakedness.
Q Mr. Selvog, to get back for just a second to the

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locked kitchen cabinet that you mentioned, did the children go hungry because of this?
A Yes, they went hungry often for days. If it wasn't for the kindness of someone down the stairs or India going out and trying to find food, they often went hungry, which left Kevin sometimes eating paint chips and just having water to drink to satisfy his hunger.
Q Did Mrs. Wiggins have a tendency to violence when she would return home?
A Yes, she would get very angry if she found that the children had found some way to get into the kitchen and take the food and would often beat them. When she did beat them she used objects, belts, straps, anything she could get ahold of, shirts, furniture. A large amount of the abuse, in particular, went to India, the oldest girl, who was the most responsible because she was oldest. But Kevin saw this abuse

17 towards his sister and he also experienced similar abuse from
18 his mother.
19 Q Okay. And what was Kevin's reaction to these
20 beatings?
21 A Well, they were very painful. They left him
22 confused, they left him frightened constantly. In that type
23 of environment where you have chronic alcoholic parent,
24 caregiver, the environment is unpredictable; the environment
25 is hostile. So there is constant fear. The effect and the

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1 symptoms of which Kevin reports and the sisters report is
2 finding ways to deal with that sort of trauma by blanking out,
3 actually a number of defenses, but blanking out, trying not to
4 feel, trying not to think about anything; sort of
5 depersonalization sort of experiences by looking on these past
6 memories of the abuse as they were occurring or after they
7 occurred as happening to someone else; being -- trying to
8 avoid the feelings of those experiences by -- in one instance
9 in particular Kevin wanted to fly, fly out of the window to be
10 free and his sisters had to hold him back.
11 Q Did Kevin's sisters also abuse Kevin?
12 A Yes. India, the oldest, who was under great
13 pressure to provide care for her siblings at age, 8, 9, 10, 11
14 years old, after growing tired of Kevin's crying for his
15 mother, crying of his hunger and just being confused, that she
16 would in her frustration with the situation, in her anger
17 would take Kevin into the bathroom, pull his pants down and
18 put him over her lap and with a pin, safety pin that she
19 straightened out, would stab him in the buttocks in the pin
20 holes until there was blood oozing out of the pin holes and
21 hit him in the face telling him to shut up and quit crying and
22 she did this until he stopped crying. This occurred on many

23 occasions.
24 Q Okay. What was the most serious incident that
25 Kevin suffered at the hand of his mother?

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1 A The most serious incident was an incident in
2 which the family recalls Kevin was playing with matches, was
3 caught by his mother who was extremely angry at him playing
4 with matches and she put his hands on a burner after heating
5 the burner up, forced his hands and held them against the
6 burner, burning his thumbs.
7 Q Did Kevin require medical attention for this
8 incident?
9 A Yes, he did require medical attention, but he
10 did not receive medical attention immediately. It is unclear
11 as to when, whether that evening or later. He didn't receive
12 it right away because the mother refused to get him medical
13 attention. She wrapped his hands and then because he kept
14 crying she unwrapped them and put them in icewater. She
15 rewrapped them after unwrapping them and she just persisted in
16 not getting him to the hospital.
17 THE COURT: How old was the young man at this
18 time, sir?
19 THE WITNESS: Approximately five years old.
20 THE COURT: Okay.
21 Q After this incident that you have described of
22 the burning, Mr. Selvog, did Kevin's natural mother retain
23 custody over Kevin and the other children?
24 A Yes, she did retain custody for sometime. It
25 was in maybe a year later in 1967 that it was finally reported

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and the children were removed from her custody.
Q What exactly precipitated their removal in 1967?
A The neighbor downstairs finally reported that she had left the children unsupervised for several days. There was an investigation by Social Services at that time and there was a founded case of abandonment and neglect. So they were placed as wards of the State in February of 1967. He was approximately six years old at that time.
Q Where did the children go then in February of '67 after being declared wards of the State?
A May I refer to my report just to be specific on the name of the foster home?
Q Sure.
A They were placed in emergency foster care with a Mrs. Tinkler.
Q How long did they stay with her?
A For approximately a year.
Q Okay. And what was the Tinkler home like for the children?
MS. BROBST: Objection. Basis.
THE COURT: Tell us, please, who you interviewed to find that information out?
THE WITNESS: Interviewed Kevin and his two sisters.
THE COURT: Sir, these interviews that you

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conducted and the way you went with them, is this the way social workers go about their business of acertaining this information?
A Yes, sir.

THE COURT: And is this accepted as a standard in your profession and trade in that situation?
A Yes, it is.
THE COURT: Okay. I don't see on this computer situation that I have -- did they do a social work interview in the trial of this case? I'm looking at my own computer statement as to what happened in this trial. There was a presentence report, correct?
THE WITNESS: Parole/probation report, yes, sir.
THE COURT: And they did some type of a background on him, right?
THE WITNESS: Yes, sir.
THE COURT: Did you base any of your decision on any of that background also? Did you review that, sir?
THE WITNESS: Yes, I did review it. I don't think I relied much at all except for maybe factual basis of maybe employment from that particular record.
THE COURT: All right. I have just got here on my computer screen when the Wiggins case came out, even before I was assigned it, all the rundown and points that I made. I have other cases on here too. I was looking for that. I

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didn't see anything mind boggling. Go ahead.
Q Mr. Selvog, let me interrupt for a second the history of Kevin Wiggins and ask you more general questions. Do social workers like yourself base opinions, commonly, generally base opinions on the sort of social history and information and interviews and records that you mentioned you have examined in this case?
A Yes.
Q That is a commonly accepted technique among social workers and professionals like you?

11 Yes. Even psychiatrists and psychologists.
12 Q Okay. Let's return then -- I think you had said
13 that in 1967 the children were placed in the Tinkler home and
14 I had asked to you describe what the Tinkler home was like for
15 the Court. Could you do that, please?
16 A Mrs. Tinkler was very religious. They went to
17 church most every evening, all day Saturdays and Sundays.
18 Church during the week was sometime after dinner until late
19 into the night, sometimes midnight. Mrs. Tinkler was very
20 strict on the children and punished them harshly at times.
21 Charlene, for sucking her thumb, Mrs. Tinkler would bite her
22 tongue. The children also received marks from Mrs. Tinkler
23 pinching them and twisting the flesh as a sort of punishment.
24 Q Why were they removed from the Tinkler home?
25 A The children recall that they were removed

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1 because during the physical examination this abuse was found
2 out.
3 Q By whom was the abuse found out?
4 A By the medical doctors who were doing routine
5 examinations on the children.
6 Q And where did the children go after being
7 removed from the Tinkler home?
8 A Placed with a Mr. and Mrs. Miner in March of
9 '68.
10 Q How long did they remain with the Miners?
11 A Approximately nine years.
12 Q Until 1977?
13 A Yes, at least Kevin stayed during that time. I
14 think his sisters left maybe a year, two earlier than he did.
15 Q Okay. What sort of person was Mrs. Miner?
16 A Mrs. Miner was described in the record as a very

17 authoritative, militaristic mannered woman; very controlling
18 person who admitted to sexually -- I'm sorry. Admitted to
19 physically abusing the children, disciplining them with straps
20 and belts.
21 Q Did she ever beat the children with something
22 other than straps and belts?
23 A Yes, with her hand.
24 Q Okay. And which of the children received these
25 beatings?

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1 A All of the children received the beatings.
2 Q Okay. Was Mrs. Miner intrusive? Did she allow
3 the children their privacy or do you know?
4 A Later when Kevin became a teenager he reported
5 that Mrs. Miner would often walk into the bathroom when he was
6 using the bath and this upset him very much and caused some
7 problems in the home.
8 Q In addition to the physically abusive behavior
9 you have described on behalf of Mrs. Miner, what was Mr. Miner
10 like?
11 A Mr. Miner was described by the children as a
12 depressed man. He worked out of the home quite a bit. He
13 often -- he was an alcoholic and had a problem with drinking.
14 He was threatening to Mrs. Miner on many occasions. Several
15 occasions brandishing a weapon, a gun at her while the
16 children were huddled in front of Mrs. Miner, frightening the
17 children.
18 He also became sexually involved with Kevin,
19 molesting him and raping him through digital penetration and
20 penile penetration within a year or two of his placement there
21 until Kevin's teenage years.
22 Q How did this first come about?

23 A Mr. Miner would isolate Kevin or get him alone
24 in the basement and then begin wrestling with him and then
25 attempt to fondle him and then would fondle him and would ask

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1 Kevin to allow him to Vaseline his finger and put it into his
2 anus and tell him that he would be his little man if he could
3 do this and that he would help Kevin to relax, taught him how
4 to breathe on several occasions so he could take the finger
5 in.
6 On several occasions he attempted to penetrate
7 Kevin with his penis. It hurt too much and he stoped at that
8 time. Sometimes this happened every day for days at a time.
9 Sometimes once a month.
10 Q And what was the time period when this was going
11 on; what years was it going on and how old was Kevin at this
12 stage?
13 A Approximately the range would be from 1969, '70
14 to 1976, '77.
15 Q Okay.
16 A That would be ages eight, nine, to fourteen,
17 fifteen.
18 Q Did Mr. Miner sexually abuse the other children
19 as well?
20 A The sisters report that he often as a way of
21 discipline asked Charlene to strip her clothes off and then he
22 would gawk at her. She was more sexually developed than her
23 cousin India -- I mean her sister India and this is why it
24 happened to her most often. Then he would spank them also
25 while they were undressed.

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1 Q Did Mr. Miner's abuse of the sort you described
2 towards Kevin cause any reactions in Kevin?
3 A Kevin was very confused. He did try to inform
4 Ms. Miner about it when it first started to occur. She denied
5 it, called him a troublemaker and a liar. It left him very
6 confused about himself, why these things were happening to
7 him, why Mrs. Miner wouldn't believe him; questions about his
8 identity; why Mr. Miner would want to have sex with him
9 because he is a male. At the same time Kevin was starved for
10 affection and needed affection and wanted to be close to Mr.
11 Miner, and this was a large reason why Kevin allowed this to
12 happen.
13 Q Did Kevin develop an inability to eat during
14 this period?
15 A Yes. Because of the confusion or at that time
16 he was unable to eat. He would stash food away in his pockets
17 from breakfast and dinner so that Mrs. Miner wouldn't get
18 angry with him. Eventually when he began to loose weight and
19 his ribs were showing he was taken to the hospital and they
20 were able to give him some medication to get his appetite
21 back.
22 Q Okay. Now, did case workers working with foster
23 children have occasion to evaluate Kevin during the time when
24 he was in the custody of the Miners?
25 A Yes, Mrs. Miner noticed several things that

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1 troubled her about Kevin; his eradic, sometimes bizzare
2 behavior. And she asked that he be psychologically evaluated.
3 So these psychological evaluations were done through social
4 services.

Q What were the results of these evaluations?
A Some of the observations were that Kevin was unable to dress himself --
THE COURT: What age are we talking about here, sir?
THE WITNESS: Talking about 1968, '69 and Kevin would have been seven, eight years old. He was unable to put his shoes on, put socks on inside out. Couldn't button his shirt. He was very lethargic in dressing and eating and doing most activities.
His memory, he was observed as his memory seems poor. He couldn't, when his foster mother asked him to do something, he was unable to carry out the task. He would quickly forget.
One of the most striking things in the record of the social worker was that they noticed that Kevin had difficulties distinguishing between fantasy and reality; that he described seeing camels or hallucinated seeing camels and that he was just a very disturbed young man because of these things. They also noticed that he was unable to concentrate or to keep his attention on things and that he would have

blank-out spells where he would be staring off into the distance for no particular reason. This was observed and reported from school officials to the evaluators also.
Q Okay.
A Could I add a couple things? And also the testing showed that he was in the borderline range of mental retardation IQ in 1971. His IQ was reported as 72.
Q And who did that testing in 1972?
A That was a pediatrician named Dr. Dancel.
Q And what then caused Kevin to leave the Miners'

home? You testified that that occurred in 1977. What was the cause of that?
A The Social Services staff were understaffed at that time. They decided to drop supervision of the Miner children from their case load. After that case was dropped Kevin again had a disagreement with Mrs. Miner because she continued to come into the bathroom while he was taking a bath. And he left the home because of that argument, because of those sort of things happening.
Q Did he run away from home?
A He ran away from home.
Q Was he found or what -- where did he turn up next after running away from the Miner home?
A It was reported that he ran away. I can't recall who --

Q Would it refresh your recollection to look at the report?
A Yes.
Q Page 16.
A Okay. Family and Childrens Society found Kevin and reported that he was homeless and that the basis for running away was his confrontation between he and his foster mother. Also that Charlene had recently left the home and this upset him also. Again, complaints of privacy in the bathroom.
Q Okay.
A And also of physical discipline, of hitting them with things and their hands.
Q I see. Where did Kevin go next after he turned up at the Family and Childrens Society?
A He was placed in another foster placement with

17 Mrs. Ware.
18 Q What was the Ware home like?
19 A He stayed there for approximately seven, eight
20 months.
21 Kevin -- Mrs. Ware observed Kevin's behavior,
22 reporting his nervousness, reporting his inability to get
23 along with the other children in the foster home. Also
24 bizzare behaviors. He refused to sleep in the bed. He would
25 slept on the floor instead. Refused medical attention for a

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1 sore throat. Refused to eat.
2 And she requested -- at that time Kevin again was
3 examined and a lot of the prior sort of findings about his
4 hyper-activities, inability to concentrate, his memory and his
5 staring and bizzare behaviors again were confirmed.
6 Q Those findings -- are you saying that those same
7 findings were made by different people in 1977?
8 A Yes.
9 Q You testified that he spent seven, eight months
10 in that home with the Wares. Where did he go after the end of
11 that seven, eight month period?
12 A He was placed in another foster home with the
13 Huntersers. It was some older children in the foster home if
14 I'm not mistaken. Yes, that's correct.
15 The husband of the foster mother, Mrs. Hunter, was
16 an alcoholic and came in and had what was called "drinking
17 brawls," described as drinking brawls by the children or by
18 Kevin, rather, with Mrs. Hunter.
19 Q Okay. And how long did he remain at the Hunter
20 home?
21 A Only about three months.
22 Q Where did he go then?

23 A Then he returned to the Miner home, to Mrs.
24 Miner.
25 Q After the abuse that you described that he

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1 received at the Miner home why did he go back to the Miner
2 home?
3 A The records indicate that Kevin believed or just
4 felt that this was the most stability he had ever known in his
5 life and that returning to Mrs. Miner was his best option for
6 him at that time.
7 Q Okay. How long did he stay the second time with
8 the Miners in 1978?
9 A Approximately seven months.
10 Q And what was that seven month stay like?
11 A Kevin had a difficult time with his behavior.
12 It was reported that he smacked or hit one of the younger
13 Foster children in the home. During that time there are
14 repots from school system of erratic behavior in school. The
15 principal had taken -- had seen Kevin many times and reported
16 Kevin's difficulty with his behavior. The principal did note
17 in the records that he felt that Kevin was not a delinquent
18 child but just a confused child. The principal from the
19 record states that he saw that Kevin was troubled and because
20 of the aggressive behavior towards the younger children in the
21 foster home he was removed and placed in a home with older
22 children.
23 Q What was that home?
24 A That home was the home of Mrs. Martha Blackwell.
25 Q How old is Kevin at this time?

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A At this point Kevin is approximately sixteen, seventeen years old.
Q When was -- how long did he stay with the Blackwells?
A Approximately nine months.
Q From when to when?
A From November '78 to July of '79.
Q Okay. Were there other children in the Blackwell home?
A Yes, there were some other foster children around his age. There were also sons of Mrs. Blackwell's that stayed there.
Q Who were the sons that remained?
A The sons Kevin recalled was Rocky and Herbert. Kevin states that he was sexually molested by Kevin and that Marvin, one of the other foster children, was sexually molested by these older children of the foster mother and that this also occurred to one of the foster girls in the house also. And this molestation occurred by getting Kevin to come down into the basement to smoke some pot and then they jumped Kevin and raped him.
Q How did Kevin react to this?
A Again, very confused, very hurt. Again, it was reported around that time from the social service records that Kevin again exhibited the dazed, wide eyed expression, this

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blankness and erratic behaviors.
Q Was Kevin still in school during this period?
A Kevin --
Q Would it refresh your recollection to look at

the report?
A Yes.
Q Page 21 or 22.
A I can't recall if he was in school at that time.
Q Let me ask you a different question. When did Kevin leave school?
A During the 11th grade, which is when he was approximately eighteen years old.
Q And was Kevin evaluated at that time by a person named Lawrence Hines?
A Yes, he was.
Q What did that evaluation reveal? First of all, who is Lawrence Hines?
A He was a staff member, a MSN -- I guess that is a nurse, Master's Degree nurse -- with a constant care community health center here in Baltimore.
Q What did Lawrence Hines conclude from that evaluation?
A Well, he referred to the strange and bizzare behavior of Kevin, being infantile at times, hostile at others. His inability to remain oriented to time, place and

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person. His history of forgetting things and causing problems in the foster home. His limited intellectual capacity. And his impression was that Kevin was suffered with mental retardation with cranial pathology and he suggested a physical exam and brain scan. He noted a question of head trauma in Kevin's record.
Q Okay. Where did Kevin go after the Blackwell home?
A He was arrested at that point and as a way of resolving his arrest he joined the Job Corp. So he went into

11 the Job Corp at that time.
12 Q When did he first sign up with the Job Corp?
13 A 1979.
14 Q Okay. How long did Kevin remain in the Job
15 Corp?
16 A Approximately two years. Maybe less than two
17 years.
18 Q Okay. Is that based on his recollection of it?
19 A Based on his recollection and the slim records
20 that we had about the Job Corp.
21 Q What happened to Kevin Wiggins in the Job Corp?
22 A Kevin reported that he was befriended by a Mr.
23 York, who was an administrator at that time who Kevin was
24 often left with during holidays and weekends. He was often
25 the only boy or one of the few boys remaining at the facility,

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1 at the Woodlawn facility. Mr. York befriended him and
2 eventually was able to take Kevin out for visits out in the
3 community. During that time he got Kevin drunk and sexually
4 molested him and became -- tried routinely to become sexually
5 involved with him.
6 Mr. York was fired and then he made continual
7 contacts with Kevin trying to get him to live with him so that
8 he could maintain this sexual relationship with Kevin.
9 Q Okay. I want to get sort of a sense of summary
10 of your testimony. Could you summarize in this case Kevin's
11 first five years with his natural mother?
12 A That he was abandoned, neglected, went without
13 food, went without proper guidance. He was physically abused
14 by both his mother and his siblings and suffered significant
15 trauma related to those events.
16 Q Okay. And then you have described, your

17 testimony is that you have described a series of placements in
18 foster care. What is the common thread that runs through his
19 foster care after being removed from his mother's custody?
20 A One of the threads is the existence of Kevin
21 being sexually molested by caregivers. Also his symptoms of
22 staring into space noted at school and in the foster care
23 placements themselves. Also the symptoms of what people
24 described as his disorientation to reality. All those are
25 consistent throughout his foster care placements.

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1 Q Okay. And in your experience, Mr. Selvog, with
2 victims of sexual abuse, your clinical experience in that
3 regard and also your experience in gathering social histories
4 and investigating the backgrounds of capital petitioners and
5 other individuals, what effects does this sort of childhood
6 history have later in life?
7 A Well, the effects of that sort of abuse and
8 experiences of neglect cause these sort of behavior problems
9 and emotional problems that Kevin exhibited throughout his
10 life.
11 Q Have you witnessed those behavior problems in
12 other people that you have counseled?
13 A Yes, I have.
14 Q What are those behavior problems as you have
15 witnessed them?
16 A Inability to form attachments. Emotionally shut
17 down and numb, depersonalized, disassociated in terms of not
18 being able to integrate memory, memory identity, consciousness
19 from time to time, which goes to the observation of Kevin as
20 being disoriented to reality.
21 Q Okay. And is that experience that you had with
22 other victims of abuse consistent with the effects you

23 witnessed in your contacts with Kevin Wiggins?
24 A Yes, it is.
25 Q And describe, if you would, those effects that

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1 you witnessed in talking to, interviewing Kevin Wiggins?
2 A Kevin exhibits extreme signs of depression. He
3 exhibits suicide ideation.
4 Q What does that mean? What is suicide ideation?
5 A A sense of hopelessness and considering the
6 option of suicide as a way of ending the hopelessness and the
7 depressing feelings that he has. That he exhibits
8 depersonalization regarding the accounts or relating the
9 accounts in a very disturbed, very difficult -- very difficult
10 for him to relate these accounts and when doing so he refers
11 to the person to himself as if he was watching what was
12 happening rather than actually saying what was happening to
13 him, which is depersonalization, which is a symptom of someone
14 who suffers these sexual and physical abuses.
15 Also his erratic behaviors from being completely
16 dependent and infantile at times to being hostile and
17 aggressive. Aggressiveness is a frequent symptom of someone
18 who experiences physical and sexual abuse. And his inability
19 to concentrate, being hyperactive throughout his academic
20 career. I think that sums it up.
21 Q Okay. And this depression you mentioned and
22 these suicidal feelings, are they consistent with what the
23 records say about Kevin Wiggins growing up, the records that
24 you examined?
25 A Yes.

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1 Q Okay. So you don't believe in your opinion in
2 covering these cases and in working with Kevin Wiggins, you
3 don't believe that these feelings that Kevin Wiggins
4 transmitted to you were a recent phenomenon?
5 A No, I do not.
6 Q Do you believe they are consistent with how he
7 has felt throughout his life as a result of the abuse that you
8 have uncovered?
9 A Yes, I do.

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19 BY MR. SIEGEL: [WITNESS: HANS SELVOG]
20 Q Mr. Selvog, I want to return to what we left off
21 with which was a little bit about your methodology and your
22 profession. Is it appropriate in your profession to gather
23 the information that you have gathered and to use the methods
24 you have used and to draw conclusions from them?
25 A Yes, it is.

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1 Q And can you explain the basis for this opinion
2 that both your method and your conclusions are generally
3 accepted in your profession?
4 A That just to say that psychiatrists and
5 psychologists also rely on this type of information to make
6 proper evaluation and appropriate diagnoses in these cases.
7 Q Okay. Is there something about your education
8 that leads you to think that it is generally accepted to draw
9 conclusions based on information gathered through
10 investigation based on a petitioner?

A Yes. One's history and the symptoms present in that history are one of the primary and predominant means of arriving at conclusions of disorders in emotional problems.
Q And are there other aspects of continuing education that you engage in as a social worker that lead you to think that your methods and your conclusions are generally accepted in the field?
A The requirement for continuing education credits in our field approved by the state, and others such as seminars and training programs, and the periodicals that social workers read about his profession that also support this.
Q These sources that you mentioned lead you to conclude that it is generally accepted then to draw conclusions from an individual's history that you gather

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through whatever means you gathered that history?
A Yes.
Q Okay. Could you, Mr. Selvog -- let me ask you again how many cases, how many social histories you have worked on in your experience?
A In capital cases in particular?
Q In general.
A Hundreds and hundreds of social histories throughout my career. I have been a social worker twenty years.
Q So is it your testimony that you have examined the social histories of hundreds and hundreds of different individuals?
A That's correct.
Q And what have you looked for in each of these histories?

A Patterns of function and dysfunction within the family, within the individual and the family and within the individual in other institutions and society.
Q Could you compare this case, this incident of abuse that you have uncovered with Kevin Wiggins, to the other cases in which you have participated?
MS. BROBST: Objection.
THE COURT: Sustained.
MR. SIEGEL: May I be heard?

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THE COURT: I don't think so. He certainly doesn't have any background that you have given so far to do that. Then what you are doing is you are imposing upon the prerogative of the jury. They are the ones that determine that. He doesn't. All he does is serve it up.
MR. SIEGEL: Thank you, Your Honor. No further questions of this witness at this time.
CROSS EXAMINATION
MS. BROBST:
Q Thank you. You testified that it is common practice and an accepted principle to gather a history and to draw conclusions therefrom, is that correct?
A Yes.
Q Isn't it true that is very important that you have an accurate history, in order to form accurate conclusions?
A Yes.
Q Let me talk to you about a little bit of the specifics --

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[BY MS. BROBST:]
Q Now, relating to certain specifics about which you have testified regarding specifically instances of sexual abuse, when did this sexual abuse begin; at what age?
A For Kevin Wiggins?
Q Yes.
A I'd say approximately -- he went into foster care around age six or seven. So around age seven.
Q And at how many hands; at the hands of how many individuals was the defendant sexually abused?
A I'd say three.
Q And those were until he was the age of what?
A Twenty, twenty-one.
Q He left foster care well before that, is that correct?
A That's correct.
Q He was in the Job Corp for awhile?
A That's correct.
Q Okay. So many of them or some of them -- strike that. One particular instance you said he was abused on a daily basis. That was in the Miner home, is that correct?
A Yes. May I clarify? Sometimes it happened for days at a time. Sometimes it happened periodically, maybe a month at a time. But it went on for a period of years, that sort of pattern.

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Q Now, you are a licensed clinical social worker but you also have a specialty, is that correct?
A Yes, it is.
Q Lately, at least, your career has been more or less dedicated to this area of sexual child abuse, is that correct?

A Yes.
Q And you are, or are you not, satisfied that these reports are accurate in the case of Mr. Wiggins?
A Yes.
Q So naturally you then reported these instances to the proper authorities, isn't that correct?
A I don't understand the question.
Q You are aware, are you not, that when a health professional receives a report of child abuse, that professional is required to report that abuse both to the law enforcement authorities and the State's Attorneys Office?
A Yes.
Q And you have done that in this case?
A No, I haven't done that. That has already been reported many, many years ago when this case first came into the court here.
Q Reports of this abuse, sexual abuse of this child, it is your testimony, were made many years ago?
A I haven't seen it in the reports but I know that

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Social Services were aware of these allegations.
Q Can you show me where in your report you indicate that?
A No, I did not include it in my report.
Q So you are saying that you have reports from the Department of Social Services that back up these allegations of sexual abuse but you didn't include them in your written report?
A No, I do not have that information.
Q Okay. Let me get this straight. You are not then aware that this sexual child abuse which you believe occurred was ever reported to the authorities, is that

13 correct?
14 A No, I believe it was reported.
15 Q Why do you believe that, sir, if you don't have
16 any of those repots?
17 A I didn't send in for any reports for that
18 information.
19 Q Mr. Selvog, you include in the written report
20 which has been introduced as a defense exhibit in this case
21 many instances of reports of DSS workers relating to his
22 inability to make eye contact, his staring into space, the
23 neglect and so forth. Can you show me one place in this
24 report where you show any health care professional ever having
25 stated that he was sexually abused or that they had a report

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1 of sexual abuse?
2 A No, I cannot.
3 Q But nevertheless you, yourself, did not report
4 this to the proper authorities, is that correct?
5 A No, I didn't feel it was appropriate to report
6 this.
7 Q Well, you are aware that it is required by law
8 to report it upon receiving such a report, are you not?
9 A If that abuse occurs to a child.
10 Q It is your testimony that in your opinion you
11 certainly -- you don't even have to agree that it occurred.
12 You have to receive a report that it occurred, is that
13 correct?
14 A I don't understand the question.
15 Q If a health professional receives a report of
16 child sexual abuse, that person is required to report that,
17 isn't that correct?
18 A Yes, if that abuse occurs to a child.

19 Q And your testimony under oath was that you
20 received such a report?
21 A I received that report from Kevin Wiggins who
22 was an adult at the time.
23 Q But you are required to do it even if the
24 person, the victim is now an adult; if it occurred while he is
25 a child, that report is required by law, is that correct?

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1 A No, that is not correct.
2 Q Okay. Are you familiar with Family Law,
3 Maryland Annotated Code, Section 5-704, the reporting statute?
4 A No.
5 Q Okay. That would be Maryland Annotated Code.
6 You are not familiar with that?
7 A No.
8 Q And I take it you are not familiar with the
9 opinion of the Attorney General dated December 3rd, 1993
10 regarding the requirement of reporting when the victim is now
11 an adult?
12 A No.
13 Q Well, do you consider what you did in this case
14 -- I think you testified on direct that you did -- that you
15 were acting as a professional in the State of Maryland as a
16 professional licensed clinical social worker?
17 A Yes.
18 Q Don't you think you should then be familiar?
19 MR. VERRILLI: Obligations under Maryland law?
20 A Yes.
21 Q Now, you are being reimbursed for your services?
22 A Yes.
23 Q And may I ask how much you are receiving?
24 A Fifty dollars an hour.

25 Q And how many hours have you spent on the case

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1 thus far?
2 A I have spent one hundred hours on the case.
3 Q And have other members of your -- is it a
4 corporation for which you work?
5 A Yes, an agency.
6 Q Are other people also billing?
7 A Yes.
8 Q Do you know how many hours your agency has
9 billed?
10 A An additional one hundred hours.
11 Q So that is a total of two hundred hours at fifty
12 dollars an hour. Is it billed the same way?
13 A Not entirely. The other billing would be
14 anywhere from twenty-five to fifty.
15 Q You have testified in six death penalty cases in
16 Maryland. Have they all been on post conviction?
17 A Yes, they have -- I'm sorry. Not all of them
18 have been on post conviction. Some were at the trial level.
19 Q Have you ever testified in a post conviction
20 proceeding where you haven't found additional information than
21 what was provided at sentencing?
22 A No.
23 Q When you interviewed the defendant, Mr. Wiggins,
24 was he aware or did you tell him for whom you were working?
25 A Yes.

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1 Q And did you tell him what your purpose was?
2 A Yes.

3 Q Okay. You stated that your source of
4 information from which you based your conclusions were the
5 defendant himself, three sisters, an aunt, two cousins,
6 records of the Maryland social service record and medical
7 records, is that correct?
8 A Say that again, please.
9 Q Okay. My understanding of your testimony on
10 direct was you based your conclusion on interviews with the
11 defendant's mother, his three sisters, an aunt, two cousins,
12 Maryland social service records and medical records?
13 A That's correct.
14 Q Okay. Did you have an opportunity to review
15 police reports?
16 A Yes, I did.
17 Q Did you have an opportunity to review the
18 presentence investigation which was compiled for this case?
19 A Yes.
20 Q I had an opportunity while you were testifying
21 to review your report and while you mention he has a sister
22 Charlene, nothing that she relates is contained herein. Is
23 Charlene here today?
24 A No, she is not.
25 Q Okay. So you liberally quote from India, the

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1 other sister, but you don't mention anything Charlene told
2 you, although you do state that you interviewed her, is that
3 correct?
4 A Right.
5 Q Were you aware of Charlene's comments in the
6 presentence investigation?
7 A I don't remember at the moment.
8 Q If I showed you the presentence investigation do

you think that would refresh your recollection?
A It might.
MS. BROBST: Would you mark this, please.
(WHEREUPON, the above referred to document was marked for Identification as State's Exhibit Number 1.)
Q Mr. Selvog, I'm showing you that which has been marked as State's Number 1 for Identification only at this time. I refer you to page 5 of that report under personal history, the second paragraph. I'd like you to review that paragraph and tell me whether or not that refreshes your recollection as to what is contained therein regarding Charlene's statements to the presentence investigator.
A Yes.
Q That does refresh your recollection?
A Um-hum.
Q What does it say that Charlene said regarding

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the family situation during the defendant's early years?
A That they were raised together in foster care. That they lived in three homes. The longest was ten years. Although the foster mother was strict, she provided a nice home with a roof over their heads. Is that what you are referring to?
Q Yes. In fact, the defendant himself related to you that he has fond recollection of Mrs. Miner; that while she was strict, she was a caring person, is that correct?
A Yes.
Q Now, take your time and review the presentence investigation if you need to. But are any of these allegations of gross physical abuse or sexual abuse contained in the presentence investigation?

A No, they are not, to my recollection.
Q Did you make an effort to interview any of those people whom you alleged were the sexual abusers of the defendant, Mr. Miner, Mr. York or Mr. whoever was in the middle?
A Yes, we tried to find these people but were unable to locate them.
Q What efforts did you make to locate them?
A Phone book. Social Service -- I called Social Services to see if these people might be available still.
Q In terms of if they were still foster parents?

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A That's correct.
Q Mr. York, I believe his name was, worked at the Job Corp center with young men?
A Yes.
Q Wouldn't that be great concern to you that if these people are sexual abusers, that they still might be working in the foster parent program in Baltimore City or Baltimore County?
A Yes.
Q But nonetheless you didn't report it?
A He wasn't working there.
Q You are unaware of whether he is working somewhere else?
A That's correct.
Q Needless to say, the police aren't looking into it as a result of your investigation, is that correct?
A Not to my knowledge.
Q You testified, and your report is rather lengthy, regarding the years until he leaves foster care and then you briefly relay his employment history on page 24 of

your report?
A Yes.
Q Don't you think important information for one of these social histories is also somebody's criminal history?
A Yes.

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Q But you don't include any of that in your report, do you, other than the fact that he entered the Job Corp?
A No, my specific task was to chronicle his early years, his social history years.
Q Well, isn't your criminal record part of your social history?
A Well, I knew it was in the pretrial report and so I just chose not to put it in there not to be repetitive.
Q How about his driving history? Even the fact that he had a driver's license, don't you consider that significant?
A Perhaps.
Q How about his institutional history, don't you consider that significant?
A Not when my specific request from the defense team was to do a social history on his early childhood.
Q That would -- on his early childhood?
A Yes, adolescent years.
Q You were restricted to that area?
A Primarily.
Q Well, did you receive a written request from them what they wanted you to go into or was that an oral request?
A That was just orally requested. That is the

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normal course of what I do is chronicle the early years.
Q Isn't it important information to know how somebody matures, what they do in later years; isn't that significant if one renders an opinion?
A Yeah, if that wasn't the focus of this particular report.
Q You are comfortable making a conclusion, a kind of broad conclusion at the end of your report, is that correct?
A Yes, I am, based on the facts in the report and the facts of my investigation.
Q So do you find it significant that he entered a relationship with an adult woman by whom he had a child in his later years or that they lived together or any of that; that doesn't seem significant to you?
A What are you referring to specifically?
Q Geraldene Armstrong, a woman several years older than him, with whom he had a relationship, sort of like what we might call a common law marriage, if that existed in Maryland. Were you aware of those facts?
A Yes.
Q And that he had fathered a child?
A At the moment I can't remember if he had fathered a child.
Q If you had included it in your report, it would

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probably be easier for you to remember that, isn't that right?
A Yes.
Q Did you interview Charlene?
A Yes, I did.

Q Now, with respect to the burning that you described in some detail on direct examination, did you find hospital records verifying the defendant's statement that he was hospitalized for approximately two weeks?
A No, I did not.
Q He even gave you the name of the hospital that he went to, is that correct?
A Yeah, he gave me the name of the hospital he thought he might have gone to. He wasn't sure.
Q Okay. And were the Tinklers interviewed?
A No.
Q Did you attempt to locate them?
A Yes, we attempted to locate all of the foster parents. I don't think we located any of them.
Q You did say you found certain records regarding the Tinklers, is that correct?
A Yes, it is.
Q Do you have the report of the medical doctor who you say removed him from the home after the examination by the medical doctor? Did you find that report?
A If it was in the social service records I don't

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recall seeing that examination by the medical doctor.
Q Do you recall testifying on direct that he was removed from the home after a medical doctor examined him and saw the twisting pinches?
A No. I recall testifying that -- removed from the Tinkler home?
Q Correct.
A Right. That was testimony from the two sisters.
Q But you didn't find a doctor's report verifying that?

A No, we did not.
Q Even though it would have been a doctor employed by DSS?
A Or else a doctor employed in private practice that the DSS used.
Q But no records to verify that?
A No.
Q Before -- how about the report of the hospitalization for being underweight; do you remember testifying that he was hospitalized for being underweight because he couldn't eat anymore because of the abuse he was undergoing?
A Yes, I remember testifying to that fact.
Q Did you find a hospital record to verify that?
A There is a hospital record in '72 about him

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having stomach problems and they couldn't find any basis to it other than the doctor just said rule out psychological problems.
Q Did it say anything about him being underweight?
A I don't recall at the moment.
Q Until you were told by the defendant about this sexual abuse, is there a single report to any other health care professional prior to yourself that you could find?
A No, there is not.
Q So from available records the first person who he told about the sexual abuse was you, the first professional person?
A Yes, it is.
Q And I believe you said, although I'm not sure, that you do not believe the sexual abuse is newly remembered, only that he never told any health professional before, is

17 that correct?
18 A Yes, as far as I can tell that is correct. That
19 is what I believe.
20 Q Now, you testified that he ran away from Mrs.
21 Miner's foster care because she would come into the bathroom
22 and violate his privacy and because she physically abused him
23 in terms of corporal punishment, is that correct?
24 A That's correct.
25 Q And you have reports corroborating that, is that

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1 correct? There are DSS reports that say that that is what the
2 defendant said at the time, that his privacy was invaded?
3 A That's correct.
4 Q But he never told anybody that he was being
5 simultaneously sexually abused by Mr. Miner, is that correct?
6 A That's correct, other than his attempt to tell
7 Mrs. Miner.
8 Q Unverified by her because you have been unable
9 to interview her?
10 A That's correct.
11 Q You have, as I understand it, interviewed his
12 mother Jean?
13 A Yes.
14 Q And she is still alive?
15 A Yes.
16 Q How old is she now?
17 A I can't say precisely. I would say fifty-four
18 or fifty-five.
19 Q And reports to you are that she has for thirty
20 years been a chronic alcoholic who drank daily to excess and
21 abused alcohol and drugs, is that correct?
22 A Yes, primarily.

23 Q You have interviewed hundreds of child victims
24 of sexual abuse?
25 A Yes.

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1 Q Have you ever --
2 A I'm sorry. Child victims of sexual abuse?
3 Q Victims of child sexual abuse?
4 A Yes.
5 Q Have you ever concluded that a claim was false
6 or unsubstantiated?
7 A Have I ever concluded?
8 Q In one of the people who you have interviewed or
9 done an investigation on?
10 A No, I have not.
11 Q Would a motive to fabricate abuse be considered
12 by you to be an important consideration in determining whether
13 a claim of sexual child abuse were true?
14 A Yes, it would.
15 Q Have you ever interviewed a defendant in a
16 capital murder case and not found a history of child sexual
17 abuse?
18 A It is hard to say for sure. I think I have,
19 yes.
20 Q Well, you list on the back of your resumé the
21 capital defendants whom you have done these cheeks on. I'm
22 familiar with some of them and unaware of any report. Perhaps
23 if you can tell us which of those individuals you failed to
24 find --
25 A I just can't remember on some at all without

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going back to my records.
Q Is it possible that has never occurred, that you have never interviewed a capital defendant --
A I don't think it is possible, that it never has occurred. I think it is possible that it has occurred that there hasn't been any sexual abuse in the background of some capital defendants.
Q Okay.
A I can say that with confidence, that there are some that don't have sexual abuse history.
Q Can you point for the Court to any documentation of the physical or sexual child abuse in any official report of the DSS or any health care professional prior to yourself at all?
A Sexual abuse did you say?
Q Yes.
A No.
Q Okay. How about physical abuse?
A Yes.
Q And that would be the reports contained in your written report?
A Yes, you mean the DSS records?
Q Yes.
A Yes.
Q Okay. You opined at the end of your report that

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those things you have testified about significantly contributed to the defendant's involvement in the present offense, is that correct?
A That's correct.

Q And you testified also that it was your opinion and the opinion -- my question is would you have offered it at trial, that you recalled that he is very disturbed and has difficulty distinguishing reality from fantasy?
A You are asking me if I would have said that?
Q If there hadn't been an objection which had been sustained?
A At the trial at the time?
Q Yes.
A You are asking me if I would have said he has a problem distinguishing fantasy from reality?
Q Did you say that on direct here?
A I said that in the record. It contained those observations. I probably would have said that from the record I had obtained those observations at the trial level.
Q Okay. And that he could be hostile and aggressive at times?
A Yes.
Q You also, I think, but correct me if I'm wrong, included in this report that he hates his biological mother?
A Yes, that he told someone that he hates his

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biological mother. I think that is in the record.
Q And none of those things would have been different in 1989, is that correct? Because you didn't do anything regarding his background except as regards his childhood background, is that correct?
A None of those things would have been different meaning?
Q Your report would not have been different had you written in 1989 recording those things, the hostility, the aggressiveness, that he is disturbed and has difficulty

distinguishing reality from fantasy and that his background contributed significantly to his involvement in this sense?
A No, put that way it wouldn't. It would have been along those lines.
MS. BROBST: Court's indulgence: That is all I have. Thank you, very much.
THE COURT: Redirect?
MR. SIEGEL: Yes, Your honor.
REDIRECT EXAMINATION
MR. SIEGEL:
Q Mr. Selvog, in your experience, your clinical experience with victims of sexual abuse, is it typical that those victims do not mention the sexual abuse at the time that it happens?
A Yes, it is.

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Q Can you explain why that is?
A Generally it is because the shame of being abused sexually. The claim of sexual abuse is not often believed by caregivers and usually because the people, most people are sexually abused by someone they know, someone in the family.
Q And how often in fact in your experience have these victims of childhood sexual abuse reported it at the time?
A Majority of the time they do not. 80, 90 percent of the time they do not report it at the time.
Q That is for the reasons you stated, shame, et cetera, is that right?
A Yes.
Q Is it also typical, Mr. Selvog, that childhood victims of abuse lack social service documentation of it?

MS. BROBST: Objection.
A Yes.
THE COURT: Sustained.
Q Let me phrase it this way, Mr. Selvog. Is it typical that childhood victims of physical abuse do not tell people at the time of the physical abuse at the hands of parents, let's say?
MS. BROBST: Objection.
THE COURT: Sustained.

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[BY MR. SIEGEL:]
Q Mr. Selvog, let me ask you this then. What I'm trying to get at is in your experience with the cases that you have examined, frequently are there no contemporaneous references to the physical abuse that these victims have suffered that you have worked with?
A Can you say that again, please?
Q In the victims that you have worked with of physical abuse, is it frequent that there are no mention at the time the physical abuse was suffered of the abuse, that they later recall as adults?
A That's correct.
Q Why is that the case?
A Of the physical abuse?
Q Yes.
A I guess there is a lot of reasons. I think one of the primaily reasons is that because, again, the abuse comes from a family member. The child receives physical abuse may believe that it is deserved and within the culture of that family believes that that is an accepted form of punishment.
Q Okay. Along those lines how is it possible, given the abuse you have described on direct examination that

24 Kevin suffered by Mrs. Miner, that Kevin would have fond
25 memories of Mrs. Miner?

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1 A Because she took care of them, fed them, clothed
2 them, gave them a roof over their heads and gave them some
3 structure that they had never had in their lives.
4 Q Is it possible in your experience in the cases
5 you have examined of these victims of childhood physical abuse
6 that the victims have simultaneously some good memories of the
7 persons who abused them and also some bad memories in the
8 particular cases you have looked at?
9 A Yes.
10 Q Why is that the case, that they would have
11 conflicting memories like that?
12 A Because the abuse occurs from caregivers and
13 there are other times when the abuse is not occurring that
14 they form affection for the particular care giver.
15 Q Okay. Now, Ms. Brobst mentioned in
16 cross-examination that Kevin might have a motive to tell you
17 about his past and to say some of the things you have said.
18 Did you consider the possibility that he would have a motive
19 to make these things up?
20 A Yes.
21 Q What effect did that possibility have on your
22 conclusions?
23 A That I stayed aware of the manner in which he
24 divulged this information and all the other things consistent
25 with someone who was sexually abused as he reported in terms

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1 of how they remember it and any other symptoms present in his

2 history.
3 Q Okay. Is it your testimony that having
4 considered that despite Kevin's possible motive to make these
5 things up, that he is telling the truth about his past?
6 A Yes.
7 MS. BROBST: Objection.
8 THE COURT: Sustained.
9 Q Is it your conclusion --
10 THE COURT: He is not getting paid to make that
11 decision. I am.
12 MR. SIEGEL: Thank you, Your Honor.
13 THE COURT: My understanding of Maryland law is
14 that that is not admissible.
15 MR. SIEGEL: Thank you, Your Honor.
16 THE COURT: You can ask him this question. Did
17 you have any reason to believe he was not telling you the
18 truth?
19 THE WITNESS: No, I did not.
20 THE COURT: That is permissible. The other one
21 isn't. Any other questions, Ms. Brobst?
22 MS. BROBST: One area, Your Honor.
23 RECROSS EXAMINATION
24 MS. BROBST:
25 Q In your discussions for reasons why sexual abuse

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1 isn't reported is fear a very important consideration?
2 A Yes.
3 Q Aren't many of these children still in the home
4 where they are being sexually abused?
5 A I'm sorry. Which children?
6 Q Aren't many of the children still in the home
7 where they are being sexually abused?

8 A Which children are you referring to?
9 THE COURT: In the cases that you described.
10 Some of the cases where children do not report, when the sex
11 abuse occurs they are still in that home, right?
12 THE WITNESS: Yes.
13 Q They have been threatened on many occasions by
14 the people in that home, in that abusive environment, is that
15 correct?
16 A Yes.
17 Q They have been told if they tell something
18 horrible will happen to someone of them or someone they love,
19 is that correct?
20 A Yes, that occurs.
21 Q That particular aspect wouldn't exist if someone
22 was no longer in that home or abusive environment, that
23 particular impediment to reporting, is that correct?
24 A That's correct.
25 Q But you failed to mention that fear aspect when

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1 you were asked why people don't report sexual child abuse? It
2 is a recognized -- I mean everybody in your field knows that,
3 right?
4 A Yes.
5 MS. BROBST: Nothing further.
6 REDIRECT EXAMINATION continued.
7 MR. SIEGEL:
8 Q I'm sorry, Mr. Selvog. I forgot to ask you
9 this. Where are the Miners today?
10 A I think they are both deceased if I'm not
11 mistaken.

* * * *

In the Circuit Court for Baltimore County

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
(Post Conviction Hearing)
Volume 3
March 28, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

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14 MR. VERRILLI: [WITNESS: CARL SCHLAICH]
15 Q Mr. Schlaich, could you give us your educational
16 background, please?
17 A I graduated from college at Randolph Macon. I
18 graduated from law school at the Univ. of Baltimore in
19 1981 and that is it.
20 Q Do you have any post graduate degrees other than
21 your legal degree?
22 A No.
23 Q What did you major in in college?
24 A Political science and computer science.
25 Q Did you take any courses in social work or

Page 5

1 sociology?

A No.
Q How about statistics?
A No.
Q Now, you are licensed and admitted to practice in this state as an attorney?
A Yes.
Q Can you give us your employment history since you were admitted?
A I was a law clerk at the Office of the Public Defender when I was admitted in 1981. Then I did some panel work for them as an attorney until I was hired full-time at the Patuxent Institution as an administrative assistant to the director.
Q When was that?
A In February of '82. And I worked there until I think October of '84 when I was hired by the Public Defender's Office full-time as an attorney here in Baltimore County. In 1988 I went to Harford County in the Public Defender's office and in 1990 I went into private practice with the law firm of Lester Jones.
In 1992 a friend and I opened up our own practice which is what we are doing now.
Q You said you left the public defender in 1990?
A Yes.

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Q Why did you leave?
A I was fired, basically.
Q Who fired you?
A Steve Harris, the Public Defender for the state.
Q What is the nature of your present practice?
A I do mostly criminal defense and our practice in total is criminal defense and personal injury basically.

Q How do you get your clients?
A Word of mouth, referrals from other attorneys in town, past clients coming back are a large percentage of them. We do a little bit of advertising in the newspaper, the yellow pages.
Q Is your reputation important to you?
A Yes.
Q Do you think it matters in terms of your ability to attract clients that you have a good reputation as a criminal lawyer?
A Yes.
Q You represented the petitioner Kevin Wiggins?
A Yes.
Q When was that?
A I think 1989, but I can't recall for sure. Probably a year or so before we actually went to trial. Something like that.
Q Prior to your representation of Mr. Wiggins how

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many death penalty case had you served as an attorney in?
A One that went to trial.
Q And who was that?
A That was Doering was his last name, D O E R I N K. That was before Judge Fader.
THE COURT: I remember. Al Wayne Doering. He was living in a trailer park. He had gone into a house that was visible from the trailer park that he was living in. He went in with a gun and during the course of a robbery he killed a man.
He had a horrible childhood. It stunk. He was really messed up in the mind. He was given the death penalty by the jury. When I fill out the report of the trial judge

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[THE COURT]
2 him life. That was the case you were involved in, right?
3 THE WITNESS: Yes, sir.
4 THE COURT: Were you involved in the trial level?
5 THE WITNESS: The first trial.
6 THE COURT: Were you involved in the resentencing
7 thing?
8 THE WITNESS: No.

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11 BY MR. VERRILLI: [WITNESS: CARL SCHLAICH]
12 Q So Mr. Schlaich, you were counsel on the initial
13 trial and sentencing in the Doering case?
14 A Right. This one came up during the retrial of
15 that one. So I was asked did I want to do the retrial or
16 start a new one.
17 Q Any other capital cases?
18 A At that point I think only Doering had gone to
19 trial. I had one other that was a potential death qualified
20 case in Baltimore County. I can't remember the man's name.
21 It is two co-defendant's accused of murdering and robbing a
22 cab driver and ultimately the death notice was filed on the
23 other co-defendant.
24 Q And not on your client?
25 A Not on my client.

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1 Q So there was Mr. Doering and Mr. Wiggins and
2 that was it in terms of capital cases?

3 A I had one pending in Harford County during Mr.
4 Wiggins's case.
5 Q Who was that?
6 A That was Shuck, S H U C K. I don't remember if
7 a notice had been placed against Mr. Shuck or not, but it was
8 a case that was being handled as that being imminent.
9 Q Okay. Now, in the Doering case were you first
10 chair or second chair?
11 A First.
12 Q Had you had any second chair responsibility in
13 capital cases before?
14 A No.
15 Q So Doering was what year?
16 THE COURT: I don't think it was '89 because '89
17 was Gilliam. I'm the one that sentenced Gilliam to death.
18 That is when Doering came back to me because I had both of
19 those within a couple of months of one another. Doering was
20 before that.
21 MS. BROBST: It was '85, Your Honor.
22 THE COURT: I knew it was a long time. But that
23 came back just about the same time that I had tried Gilliam.
24 I sentenced Doering to life, which I always thought was one of
25 the reasons Gilliam took me, but I don't know. Then I had

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1 that.
2 A That sounds about right to me too.
3 Q Okay. You left the Baltimore County Public
4 Defender's office in 1989, is the right?
5 A I think I actually left in '88 and I still had
6 some cases here that I kept and traveled back and forth to
7 finish.
8 Q Was Kevin Wiggins case one of those cases?

9 A Yes.
10 Q How long in advance of the trial and Kevin's
11 case did you leave Baltimore County?
12 A I can't recall.
13 Q Was it a few days, a few weeks, a few months?
14 A I think it was a few months.
15 Q And during that span you spent the majority of
16 your time where, in Harford County or in Baltimore County?
17 A My full-time job was in Harford County and I
18 would say that I probably was down here a day a week or so.
19 Maybe more sometimes. I had two major cases pending.
20 Q Okay. That was in addition to your full-time
21 job in Harford County?
22 A Right.
23 Q And did you have administrative responsibilities
24 in addition to trial responsibilities in Harford County during
25 that period?

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1 A A few.
2 Q Okay. About how much of your time did that
3 take?
4 A Maybe a morning a week.
5 Q Okay. During that time, that period of months
6 you just described when you were in Harford County and you
7 were preparing for trial in Mr. Wiggins case, what percentage
8 of your time did you spend preparing his defense, Mr. Wiggins
9 defense?
10 A I would have a hard time estimating that. I'm
11 pretty sure that Miss Nethercott and I talked almost every
12 day.
13 Q I'm sorry to interrupt you. Perhaps you should
14 identify who she is?

15 A Co-counsel for Mr. Wiggins. I think we talked
16 on the phone just about every day. Michelle Nethercott was
17 doing the local leg work and most of the visits to see Mr.
18 Wiggins at the jail at that point in time. And then we would
19 get together and do the things that we needed to do
20 face-to-face once a week I would think. So roughly
21 twenty-five, thirty percent let's say.
22 Q So that is a day and a half a week?
23 A Up until getting actually ready for the trial
24 and weeks before that.
25 Q When was that, Mr. Schlaich, when did you start

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1 actually getting ready for trial?
2 A I think that I was let out of my Harford County
3 cases, case responsibility about a week before Mr. Wiggins's
4 case was supposed to start so I could have solid time down
5 here.
6 Q So it was a quarter of your time until then and
7 then full-time I take it once you were released from your
8 Harford County responsibilities?
9 A Right.
10 Q Well, who did most of the work in preparing Mr.
11 Wiggins case, you or Miss Nethercott?
12 A Miss Nethercott did most of the writing and the
13 motions researching and at some point most of the
14 communicating with Mr. Wiggins.
15 Q At what point?
16 A Well, I can't put a time on it. We reached a
17 point where we felt that Mr. Wiggins communicated more easily,
18 more readily with Michelle than with me. So we only sent her.
19 Q When did you reach that point?
20 A I couldn't tell you. I don't know.

21 Q Was it a week before trial, eight months before
22 trial?
23 A It was at some point after I went to Harford
24 County.
25 Q So --

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1 A Not immediately before the trial. A period of
2 time passed.
3 Q A period of months?
4 A Um-hum. Yes.
5 Q And I'm not sure I got an answer to the question
6 I asked you previously, who did most of the work; was it you
7 or was it Miss Nethercott in preparing for trial?
8 A I think Miss Nethercott did most of the work.
9 Q You said she did the legal work and drafting of
10 motion and pleadings?
11 A For the most part, yes.
12 Q Did you edit them?
13 A Yes.
14 Q What about factual development, who did most of
15 the work in terms of factual development?
16 A Most of the factual development was done I think
17 before I actually went to Harford County. So we worked on
18 that, Michelle and I, side by side literally -- our offices
19 were side by side and we were working on this every day.
20 Q So who did most of the work, you or Michelle?
21 A At that point I would say it was pretty evenly
22 split.
23 Q But then you left for Harford County?
24 A Yes.
25 Q That was several months before trial?

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1 A Yes.
2 Q Who did most of the work on the factual side
3 after you left for Harford County?
4 A Miss Nethercott.
5 Q What percentage would you say after you said it
6 was about equal before you left for Harford County; after you
7 left for Harford County what was the ratio would you say
8 between the factual work she did and the factual work you did?
9 A It is hard to put an estimate on that. She did
10 the majority of the factual work.
11 Q Substantial majority?
12 A Yes.
13 Q More than three quarters?
14 A I couldn't say. But a substantial majority.
15 Q Okay. Now, prior to your representation of Mr.
16 Wiggins had you ever attended any seminars or conferences on
17 the proper way to conduct a defense in a capital punishment
18 case?
19 A Yes.
20 Q Can you detail those for us, please?
21 A I went to one sponsored by the Public Defender's
22 Office. It was a two day seminar. I don't remember the year,
23 but it was before this case.
24 Q Where was it?
25 A It was at Saint Mary's Seminary in Baltimore

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1 City.
2 Q Here in Maryland?
3 A Yes.
4 Q Was it in 1987? Does that sound right to you?

A That sounds right.
Q What subjects were covered at that seminar?
A What sticks in my mind were jury selection tactics and mitigation proposals. And there were, as I recall, some jurors that actually volunteered to come from other cases who talked about what impressed them and what did not impress them.
Q What do you remember about the presentations of those jurors at the seminar?
A I remembered leaving there with the feeling that there was no real answer as to what impressed them and what didn't because everyone had a different opinion. Even people on the same case didn't think that the same thing was important to them.
Q What did they talk about?
A I don't recall any specifics anymore.
Q How about in general?
A Uhm --
Q Let me ask you this. Were they talking about what kind of evidence and argument moved them to vote against the death penalty, is that what it was about?

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A As I recall, I think the cases that they came from were cases where the death penalty was imposed but I can't say that for sure. The idea was they were going to explain what was good and what was bad.
Q And what kind of things did they say were good?
A I can't specifically recall what the jurors said they thought was good. I remember some of the themes of the conference about what the lawyers were saying.
Q Mr. Schlaich, I'm sorry to cut you off but let's stay with the jurors for a minute and talk about the rest of

the conference in a minute.
MS. BROBST: Objection. He was answering the question.
THE COURT: Did you finish your answer, sir? I thought you had finished.
THE WITNESS: Yes, sir.
THE COURT: You said you could not remember what the jurors said but you could remember what some of the themes of the conference were, is that correct?
THE WITNESS: Yes.
THE COURT: Does that constitute the answer to the question or do you have anything else to add?
THE WITNESS: That is my answer.
Q So you said, if I remember, Mr. Schlaich, that you couldn't remember in specifics what the jurors said were

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good defense arguments and good defense evidence?
A Right.
Q Do you remember in general what the jurors said?
A No.
Q Were there any expert panelists who spoke about proper way to conduct a capital defense at this seminar?
A It seems to me that there was a forensic social worker there and who else -- there was a panel and I don't recall who was on it.
Q And there was one panel?
A No. It was a Friday night and there was a panel I think that was when the jurors were there and then all day Saturday.
Q How many panels were there?
A I couldn't recall. Three, four, something like that.

17 Q How many did you go to?
18 A All of there.
19 Q What were they about?
20 A There were little groups breaking out where you
21 could only pick one as I recall.
22 Q Okay. So how many panels did you attend?
23 A Friday night, Saturday -- probably three or
24 four.
25 Q And what were they about?

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1 A I don't recall.
2 Q You just don't recall?
3 A No.
4 Q So all you can recall about this conference then
5 is that there were some jurors in capital cases who talked
6 about what was good defense argument and evidence and what was
7 bad, but you can't remember what was good and what was bad?
8 A Right.
9 Q Then there were three or four panels at this
10 conference; you went to them but you can't remember what they
11 were about except you do remember there was a forensic social
12 worker on one of the panels?
13 A Right.
14 Q That is it?
15 A Right.
16 Q Have you attended any seminars or conferences or
17 panels subsequent to that?
18 A On death penalty?
19 Q On death penalty issues.
20 THE COURT: Mr. Schlaich, did you indicate to us
21 when that conference was, sir?
22 THE WITNESS: It was indicated to me that it was

23 1987. That sounds correct.
24 THE COURT: Sounds good to you?
25 THE WITNESS: Correct.

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1 Q It was before you undertook the representation
2 of Mr. Wiggins.
3 A Yes.
4 Q Have you attended any other conferences or
5 seminars on capital defense?
6 A Not specifically on capital defense. The
7 subject has been covered in other criminal defense seminars.
8 Q That you have attended?
9 A That I have been to, yes.
10 Q Did you attend the panels that were covering
11 those subjects?
12 A Yes.
13 Q Did you -- can you detail for us when those
14 seminars occurred?
15 A I have been to the fall seminar that is
16 sponsored by Public Defender's Office and the Maryland
17 Criminal Defense Attorneys Association every year since it
18 started, which probably the next year is 88. And from time
19 to time topics related to -- that would apply to death penalty
20 cases have come up, juror selection, forensic experts, DNA,
21 things like that, that I feel are things you most frequently
22 run into in a murder case basically.
23 Q When you talk about forensic experts, what do
24 you mean by that phrase?
25 A Well, a forensic expert is a person who is an

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expert in some field and applies that to court cases.
Q And would a forensic social worker be one such expert?
A Yes.
Q Mr. Schlaich, I'm going to hand you a document which has been admitted into evidence with one qualification in this proceeding. It is PC-Number 2, the report of Hans Selvog. I will ask that you take a few minutes and read this document.
Your Honor, that may take the witness five or ten minutes. I don't want to burden the Court. If a short recess might be appropriate, that would be fine.
THE COURT: We will take a recess.
MR. VERRILLI: Thank you.
(WHEREUPON, the court recessed and reconvened.)
THE COURT: What you showed him, has that been introduced in evidence?
MR. VERRILLI: Yes, Your Honor, its admission was moved.
THE COURT: Fine. You must remember that it has been a long time. I can't remember what the status of evidence is. What exhibit is it?
MR. VERRILLI: PC-2. There is a qualification on its admission. I want to make sure it is clear. Ms. Brobst objected to a number of the conclusions in the report. The

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objections were overruled except that one was sustained, and that went to the material on pages 26 and 27 where the report quotes from a Doctor Marie Fortune. The Court --
THE COURT: Page what?

MR. VERRILLI: 26 and 27.
THE COURT: All right.
MR. VERRILLI: This is all at pages 50 to 53 of the transcript of the January hearing. With that qualification it was offered, all the objections overruled except that one.
THE COURT: All right. Thank you.

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[BY MR. VERRILLI: WITNESS: CARL SCHLAICH]
Q Let's go back to the mitigation case now, Mr. Schlaich. After you left for Harford County, which I take it was some months before the trial, who had the primary responsibility for developing the case in mitigation and sentencing, you or Miss Nethercott?
A I think that the primary responsibility -- you said for mitigation. Is that specifically?
Q Yes.
A As I recall, we arranged it so that Michelle Nethercott did most of the mitigation preparation. That is my recollection.
Q And did you give her guidance about what to do?
A Yes.
Q What did you tell her to do?
A Well, basically what we did in mitigation was attempt to retry the factual case and try to convince a jury that the State's case on principal issue was just not there.
Q Right. When did you make that decision?
A I don't recall timewise, but I'm sure it was before the trial on the facts because it had to do with how we made the decision about what to recommend to Mr. Wiggins about

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1 jury or judge trial, et cetera.
2 Q So it was in advance of the guilt/innocence
3 trial, is that what you are saying?
4 A Yes.
5 Q How far in advance?
6 A I don't recall.
7 Q Days, weeks, months? How far?
8 A I'm sure it was weeks or months. We didn't rush
9 into this thing.
10 Q So months in advance you made a decision that
11 that was going to be your case at sentencing?
12 A A final decision, no, I don't think we made that
13 months in advance. But I think that was the plan that we
14 operated on at some point in advance of the trial on the
15 facts.
16 Q Months in advance of the trial you settle on a
17 plan that your strategy at sentencing would be to retry
18 guilt/innocence as you described it?
19 MS. BROBST: Objection.
20 THE COURT: Overruled. Can you answer that
21 question, sir?
22 THE WITNESS: I can't answer it with respect to
23 whether it was made months in advance. But that was the
24 decision that was made, yes.
25 Q And -- withdrawn. Now, did you engage --

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1 THE COURT: Let me ask a question to orient
2 myself. The guilt/innocence phase of this case was tried
3 before a jury?
4 THE WITNESS : No.

5 THE COURT: Before Judge Hinkel?
6 THE WITNESS: Yes.
7 THE COURT: The death penalty aspect, who was
8 that tried before?
9 THE WITNESS: A jury.
10 THE COURT: Okay. Go ahead.
11 Q And now, you testified previously about your
12 experience at this 1987 conference and that one of the
13 panelists was a forensic social worker?
14 A Yes.
15 Q Did you retain a forensic social worker to
16 assist in the preparation of the case on mitigation in this
17 case?
18 A My recollection is that we did not, but I can't
19 say that for sure without going through the materials which I
20 haven't seen since this case.
21 Q But your recollection is that you did not?
22 A Yes.
23 Q Now, were there funds available from the Public
24 Defender's office for such a purpose to retain such an expert?
25 A With a struggle, yes, there were funds

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1 available.
2 Q Was there any rule or policy of the Public
3 Defender's office that prohibited you from retaining a
4 forensic social worker?
5 MS. BROBST: Objection.
6 A No.
7 MS. BROBST: Relevance.
8 THE COURT: Overruled.
9 Q Your answer was?
10 A No, there was no policy prohibiting that.

11 Q Did any of your superiors at the Public
12 Defender's Office prohibit you from doing it?
13 MS. BROBST: Objection. Same grounds.
14 THE COURT: Overruled.
15 A No.
16 Q Well, weren't such social histories, work-ups by
17 forensic social workers, prepared in other capital cases
18 handled by the Maryland Public Defender?
19 A Yes.
20 Q You were aware of that?
21 A Yes.
22 Q During the time you prepared this trial?
23 A Sure.
24 Q Now, I have asked you to review the document
25 that has been admitted in evidence PC-2, the Selvog report.

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1 Have you had a chance to review that?
2 A Yes.
3 Q Do you know who Mr. Selvog is?
4 A No. I know the place that he is writing from.
5 Q By that do you mean NCIA?
6 A Yes, the National Center for Institutional
7 Alternatives.
8 Q What do you know about it?
9 A It is a place that I have used in the past in
10 some cases and what it does is attempt to establish mitigation
11 for you or attempt to find placement short of incarceration to
12 make recommendations for treatment centers.
13 I have used them in cases where they have put
14 packages together of here is what we do with this person, here
15 is what we would recommend doing with this person within the
16 ability of the system to fund it and to place the person and

17 then I have had them come to sentencing and testify.
18 Q At sentencing in capital proceedings?
19 A I don't think I used NCIA in a capital
20 proceeding. I used them in some juvenile waiver cases and one
21 that comes to mind was an attempted murder case, a juvenile
22 case in the waiver on that or the reverse waiver.
23 Q And this was during your time as an employee of
24 the public defender?
25 A Yes.

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1 Q And did you use their services at any time
2 before the trial of Mr. Wiggins?
3 A I don't believe so.
4 Q So it was after. Now --
5 A You mean --
6 Q Did you retain them for any case prior to your
7 representation of Mr. Wiggins?
8 A Yes.
9 Q So you knew about NCIA before you took on your
10 representation of Mr. Wiggins?
11 A Yes.
12 Q Does that include knowledge of the services they
13 could provide with respect to mitigation evidence in captial
14 cases?
15 A I don't believe I had seen them used in a
16 capital case. The only litigation type witness I had seen
17 used by the Public Defender's office in a capital case was a
18 social worker out of New Jersey whose name I don't recall.
19 Q Now, I'm sorry, I don't think I asked you that.
20 I asked you whether you were aware of the services that NCIA
21 could provide in a capital case at the time that you did Mr.
22 Wiggins's trial?

23 A Specifically in a capital case, no.
24 Q But you were aware that the public defender had
25 hired social workers to do work-ups on social histories?

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1 A Yes.
2 Q Like the one that is before you, PC-2?
3 A Yes.
4 Q And you did not do that as far as you can
5 remember in this case?
6 A That is my recollection.
7 Q But you knew that Mr. Wiggins, Kevin Wiggins,
8 had been removed from his natural mother as a result of a
9 finding of neglect and abuse when he was six years old, is
10 that correct?
11 A I believe that we tracked all of that down.
12 Q You got the Social Service records?
13 A That is what I recall.
14 Q That was in the Social Service records?
15 A Yes.
16 Q So you knew that?
17 A Yes.
18 Q You also knew that where were reports of sexual
19 abuse at one of his foster homes?
20 A Yes.
21 Q Okay. You also knew that he had had his hands
22 burned as a child as a result of his mother's abuse of him?
23 A Yes.
24 Q You also knew about homosexual overtures made
25 toward him by his Job Corp supervisor?

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1 A Yes.
2 Q And you also knew that he was borderline
3 mentally retarded?
4 A Yes.
5 Q You knew all --
6 A At least I knew that as it was reported in other
7 people's reports, yes.
8 Q But you knew it?
9 A Yes.
10 Q And you knew all of those things and you did not
11 retain a forensic social worker to do a social history?
12 A As I recall that is correct.
13 Q Okay. Now, Mr. Schlaich, is the case of Lockett
14 versus Ohio familiar to you?
15 A The name is.
16 Q Do you know anything about what the case holds?
17 A Not off the top of my head, no.
18 Q How about Ettings versus Oklahoma?
19 A Only the name.
20 Q Nothing about the case?
21 A Not at the moment.
22 Q How about Penry versus (Phonetic) Lynholm?
23 A No.
24 Q How about Hitchcock versus Douglas?
25A No.

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1 Q Can you name a single case from the United
2 States Supreme Court that sets forth the mitigating standards
3 in a capital case?
4 A No.

Q Not one?
A No.
Q Well, do you know at least that low intelligence can be a mitigating factor in a capital case?
A Sure.
Q Do you know that abusive family background can be a mitigating factor?
A Yes.
Q Do you know that sex abuse can be a mitigating factor in a capital case?
A Yes.
Q Now, you had testified previously that your approach to sentencing was to retry the guilt and innocence phase of the trial. When you decided on this approach to sentencing did you realize that one of the first things that would happen at the sentencing phase is that the judge would instruct the jury that he, the judge, had found Mr. Wiggins guilty of first degree murder and that the jury was obligated to accept that finding; did you understand that was going to happen?
A Yes.

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Q I want to turn to a different subject now, Mr. Schlaich, and it is an issue that you talked a little bit about a few minutes ago. It is the question about the availability of an expert, medical expert. Perhaps you could set the stage for us a little bit about explaining what your theory of the defense was at the guilt/innocence stage of this trial?
A Our theory was that Mr. Wiggins was in possession of property belonging to the victim, specifically her car and her credit cards, and was using them, and there

was a trial showing that he was using them before she was -- before she had died.
So the theory was that he could not have been personally responsible for her murder because he did not -- he did not come into possession of her property as a result of the murder of her basically.
Q So is it fair to characterize what you just said, to synopsize it by saying the time of death was a very important issue?
A Sure, that was key.
Q That was a key issue in your opinion?
A Yes.
Q Now, who was the State's expert at trial, the guilt/innocence trial with respect to the time of death?
A I don't recall. It was a female pathologist.

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Q If I told you it was Dr. Korell?
A Margerita Korrell.
Q Did you personally have any contact with Dr. Korrell prior to the guilt/innocence trial?
A I would have to check my notes. I don't recall.
Q You don't remember?
A No.
Q You don't remember talking with her?
A Not myself.
Q Did your co-counsel Michelle Nethercott?
A I know that Michelle talked with Dr. Korrell at some point. I don't remember when or for how long.
Q Do you remember what the substance of those conversations between Miss Nethercott and Dr. Korrell consisted of?
MS. BROBST: Objection.

17 THE COURT: Do you know, yes or no? Do you have
18 any recollection of knowing that information?
19 THE WITNESS: Yes.
20 Q Can you tell us what that was?
21 MS. BROBST: Objection.
22 THE COURT: Sustained.
23 MR. VERRILLI: Your Honor, might I --
24 THE COURT: One moment. Is it -- what you know,
25 is it something you read or something that Miss Nethercott

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1 told you?
2 THE WITNESS: I was told.
3 THE COURT: By who?
4 THE WITNESS: By Miss Nethercott.
5 THE COURT: So what you will relate to us now is
6 from what Miss Nethercott told you?
7 THE WITNESS: What I recall of what she told me.
8 THE COURT: Okay. That question he can answer.
9 A My recollection is that Miss Nethercott was told
10 that --
11 MS. BROBST: Objection.
12 THE COURT: What we need to know is what your
13 recollection is Miss Nethercott told you.
14 THE WITNESS: Okay. My recollection is that the
15 State was going to have some difficulty pinning down a time of
16 death.
17 Q Can you be more specific about what Miss
18 Nethercott told you? Can you remember anything more specific
19 than that?
20 A Not at this time, no.
21 Q Do you recall discussing with Miss Nethercott
22 whether that information that she received from Dr. Korrell

23 would necessitate her having to be a witness in this case?
24 A I remember that issue coming up. I think it was
25 after the guilt/innocence and before the sentencing when that

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1 occurred. I can't say for sure.
2 Q So you remember the issue coming up. When you
3 say coming up, do you remember discussing it with Miss
4 Nethercott?
5 A Yes.
6 Q Did you make a decision about whether she should
7 serve as a witness or not?
8 A Yes.
9 Q What was your decision?
10 A That we decided not to.
11 Q Why not?
12 A Because we -- I believed that Dr. Korrell was
13 not going to be so slippery, as to deny having had the
14 conversation with Miss Nethercott when Dr. Korrell testified.
15 Q So you thought that if -- that Miss Nethercott,
16 and please correct me if I'm mischaracterizing -- you thought
17 that if asked, Doctor Korell would agree that she had this
18 conversation with Miss Nethercott?
19 A Yes.
20 Q And that if asked she would agree with Miss
21 Nethercott's characterization of the conversation?
22 A Yes.
23 Q So it was on that basis that you decided Miss
24 Nethercott didn't need to be a witness?
25 A Yes.

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Q Was the possibility of Miss Nethercott having to recuse as a lawyer if she served as a witness a factor in that decision at all?
A Sure it was a factor, yes.
Q And can you explain the way in which it was a factor?
A Well, the person that has been preparing to handle the mitigation case suddenly would become unavailable and that would necessitate some rather grim changes.
Q That would be a particular hardship for you because you were in Harford County and had all of those other responsibilities?
A No.
Q No?
A No. Because I was freed of those responsibilities long enough to do Mr. Wiggins's case.
Q That week before trial?
A That was before the guilt/innocence and then we did the same thing before the sentencing.
Q So a week before guilt/innocence and the same thing before sentencing?
A I'm saying a week. I don't have a calendar.
Q But it was about a week?
A As I recall.
Q Now, did you do any research into the Maryland

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Rules of professional conduct before reaching this conclusion that Miss Nethercott would have to recuse herself if she served as a witness?
A I don't believe that I looked up the rules, no.

Q Do you know what rules of professional conduct are concerning this question of an attorney serving as a witness?
A No.
Q Do you know what the Maryland Rules generally say about this?
A I know there is a rule on it. I don't know what it says.
Q Do you know if it has any exceptions?
A I would imagine it does. I don't know.
Q You don't know?
A No.
Q So you don't know what they are?
A No.
Q You didn't look them up before you made this decision?
A Not that I recall.
Q Well, did you ask Miss Nethercott to look them up?
A Not that I recall.
Q Do you recall anybody looking them up?

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A Not that I recall.
Q So you don't know? You didn't know whether as a matter of Maryland Professional Rules of Conduct Miss Nethercott would have been required to recuse when you made this decision back in 1989?
A Right.
Q You didn't know and you didn't look into it?
A No.
Q I take it that you cross examined Dr. Korrell?
A I don't recall.

11 Q You don't recall who cross examined Dr. Korrell?
12 A No.
13 Q Do you recall anything about the substance of
14 the cross-examination?
15 A My recollection is that at the trial on
16 guilt/innocence Dr. Korrell's testimony was not particularly
17 strong for the State's case about pinning down a time. My
18 recollection is that at some point Judge Hinkel agreed that he
19 would not consider her opinion with respect to that.
20 Q Well, I guess I'm asking whether you remembered
21 -- withdrawn. Do you remember the substance of this
22 cross-examination?
23 MS. BROBST: Objection. Your Honor, the
24 transcript would reflect that.
25 THE COURT: Overruled.

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1 A No.
2 Q So I take it then that you do not remember
3 whether Dr. Korrell was even asked about this conversation
4 with Miss Nethercott?
5 A I don't remember.

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[WITNESS: CARL SCHLAICH]
9 CROSS-EXAMINATION
10 MS. BROBST:
11 Q In addition to availibility of witnesses, there
12 are a number of other valid reasons and things that go into a
13 decision of whether to go court or jury, is that correct?
14 A Yes.
15 Q And at the time you tried the Wiggins case can

16 you estimate for us approximately, if you can, the number of
17 felony cases that you had handled?
18 A I couldn't say for sure. I know that I was
19 handling two hundred a year, maybe more.
20 Q And you had been a member of the bar and
21 specifically employed by the Public Defender's office at that
22 point for approximately four or five years?
23 A Yes.
24 Q And in each felony case which goes to trial a
25 decision has to be made whether to proceed by court or jury,

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1 is that correct?
2 A Yes.
3 MR. VERRILLI: Objection. I did not -- I think
4 this goes beyond the scope of direct.
5 THE COURT: I don't think so. Overruled.
6 Q And you had made such a decision in consultation
7 with your client in each felony case you had handled that had
8 gone to trial, is that correct?
9 A Yes.
10 Q Can you explain for the Judge some of the things
11 you consider in deciding to go court as opposed to jury?
12 THE COURT: Sustained. As to this case he can
13 answer. As to generally, I don't want to listen to it.
14 Q Did you use your experience and training in
15 making the decision in this case?
16 A Yes.
17 Q And did you apply those factors to the decision
18 in this case, or at least the suggestion that you made to Mr.
19 Wiggins?
20 A Yes.
21 Q What was some of the factors that you considered

in this case on the issue of whether to go court or jury as to guilt and innocence?
A There were several. One would be my experience with juries in this county which I found to be that they are

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extremely conservative, that they are not for the most part filled up with highly educated people; that I found them to be very bent towards guilt; I found them in the cases before Mr. Wiggins to be very death oriented. I was concerned that a jury with that mindset would be overcome by the facts in this case which were that an elderly white woman was found drowned in a bathtub full of chemicals and we had a young, strong black man as the sole suspect brought forward and I thought that we had a good case on reasonable doubt and a jury might just look past that reasonable doubt under just those circumstances.
I thought that Judge Hinkel would be able to look past the race issue, past the issue that an elderly person had been killed and the circumstances under which she had been killed and look at the reasonable doubt question and make a decision, solid, intellectual decision.
Q So you felt this was a reasonable doubt case, is that a fair statement?
A Yes.
Q Additionally, you and co-counsel had filed a number of pretrial motions dealing with the issue of death qualified jury, is that correct?
A Yes.
Q You felt that a jury which became death - qualified, to wit had been Witherspooned, is more conviction

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prone, is that it?

* * * *

Q Did you consider and discuss with the defendant the apparent view of the Public Defender's office, since they filed this motion in every case, that a death qualified jury is more conviction prone?
A I believe that I discussed that with him, yes.
Q And didn't the defendant when waiving jury state that that was one of his reasons for electing court?

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A I don't know. I don't recall.
Q Okay. Now, the court/jury election with respect to guilt/innocence occurred at what time prior to trial?
A I just don't remember. I don't remember if it was just immediately before or whether it was a separate proceeding. I don't recall.
Q Do you recall those discussions occurring in the lock-up?
A The discussions with Mr. Wiggins?
Q Yes.
A I'm sure we talked about that in the lock-up here and at the jail previous to that.
Q And do you recall being present for those discussions?
A Yes.
Q You stated on direct examination that you had also been trial counsel in the case of Al Wayne Doering, is that correct?
A Yes.
Q And that case proceeded by jury with both

guilt/innocence and sentencing, is that correct?
A No, it was a judge facts and jury sentence.
Q Okay. And in the Doering case isn't it true
that you as counsel for the defendant introduced voluminous
mitigation evidence with respect to background?

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MR. VERRILLI: Objection as to the
characterization.
THE COURT: Overruled.
A Yes.
Q And did that include, as to background of Mr.
Doering, a psychiatrist?
A Yes.
Q And a psychologist?
A Yes.
Q And a social worker?
A I can't remember about the social worker. I
don't remember.
Q And Mr. Doering had also killed an elderly
person during a burglary, is that correct?
A Yes.
Q There was evidence that Mr. Doering had been
sexually abused as a child, is that correct?
A Yes.
Q And physically abused as a child, is that
correct?
A Yes.
Q He had been in foster care?
A Yes.
Q And all that information had been presented to
the jury in the Doering case, is that correct?

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A Yes.
Q And additionally, you had been able to
corroborate through records and the testimony of independent
witnesses that abuse in the Doering Case, is that correct?
A Yes.
Q And what sentence did the Doering jury return?
A Death.
Q You had tried that how long before you tried the
Wiggins case?
A I don't recall. I would guess two years or
maybe a little longer than that.
Q In your preparation for the trial of this case
did you have the -- did you ever consult with the Capital
Litigation Division of the Public Defender's office?
A I imagine I did because they control the purse
strings to some extent.
Q And do you recall filing their suggested
pretrial motion?
A Yes.
MS. BROBST: Your Honor, at this time I don't
intend to review with Mr. Schlaich the pretrial motion filed,
argued and litigated because I think they are part of the
record. I would ask the Court's permission to refer to them
in argument rather than go through the docket entries with
him.

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THE COURT: You don't need my permission to do
that.
Q So you felt that tactically the way to proceed
on this case would be to --

MR. VERRILLI: Objection.
THE COURT: Well, she can summarize. Go ahead.
Q Thank you. Get two shots at the principal issue, is that correct?
A Yes.
Q And you were aware or were you aware that the State had to completely retry the case before the jury on sentencing if you proceeded by a court at merits?
A Sure.
Q You would then -- wouldn't you then have available to you the transcripts of all of the witnesses who had testified at the Court trial?
THE COURT: I doubt that.
A I was going to say I don't recall whether we had all of the transcripts. We probably had the transcripts of Dr. Korrell for example who we knew would be coming back.
Q How about Edythe Vassar, didn't you feel she was an important witness for cross-examination; it would be nice to get two cracks at her?
A Yes. There was somebody that we deposed.
Q Right. And you had in fact deposed a witness

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pretrial in this case, is that correct?
A Yes.
Q Was that common practice for you as an assistant with the Public Defender's office?
A No. That was a first.
Q Okay. Did you bring with you to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury?
A It is not experience because I don't do that. I

try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to go after that point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish with it.
Q And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?
A Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.
Q And what did you think of that as a tactical

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position to take?
A It is a difficult position to take. There are things done to try to negate some of the bizzare appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like -- try to remove some of that taint of conflicting story there. But it seems to me if you can get away without doing it, it would be better.
Q Do you recall receiving from Judge Hinkel a big concession on the jury instructions --
MR. VERRILLI: Objection.

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[WITNESS: CARL SCHLAICH; BY MS. BROBST:]

20 Q Do you recall in camera discussions regarding
21 jury instructions at the death penalty stage?
22 A Yes.
23 Q Do you recall the issue regarding what a jury
24 must determine if aggravating circumstances were found to
25 outweigh mitigating circumstances?

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1 THE COURT: Remember anything about that?
2 THE WITNESS: Not specifically.
3 THE COURT: When she says in-camera, what do you
4 mean by that?
5 MS. BROBST: In the judge's chambers as opposed
6 to the courtroom.
7 THE COURT: Okay.
8 Q Prior to your trial of the Wiggins case had you
9 had experience with cross-examination of experts by the State
10 in the witnesses called by the defense on a defendant's
11 background?
12 A Yes.
13 Q And what was your experience in that regard with
14 respect to what could be elicited by the State?
15 A My experience was that once we started opening
16 the door, then the State would start asking about things that
17 could be construed as the person being a danger, as being
18 crazy, as being reasons why the jury shouldn't be particularly
19 merciful.
20 Q And do you recall whether a PSI was ordered in
21 this case?
22 A I'm sure it was.
23 Q Does a PSI include a background history of a
24 defendant?
25 A To some extent. I think that in this case we

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1 actually tracked down the PSI writer and supplied them with
2 things we had.
3 Q Okay. Prior to the hearing today had you been
4 provided by Petitioner's counsel a copy of what they are
5 referring to as PC-2?
6 A No.
7 Q So they never mailed that to you or gave you an
8 opportunity to view it before today's hearing?
9 A No.
10 Q Do you recall whether Dr. Korrell was able on
11 direct examination to give an opinion as to time of death in
12 this case?
13 A My recollection is that in guilt/innocence she
14 could not give an opinion. And at sentencing the Medical
15 Examiners Office produced her boss to testify that Dr. Korrell
16 was not so accurate.
17 Q Okay. If Dr. Korrell could not give an opinion
18 as to time of death on direct examination on guilt/innocence
19 what would have been the tactical advantage of cross examining
20 her on time of death?
21 A None that I could see because we had an expert
22 coming in who was going to address some of the same areas that
23 she addressed in terms of the things she used to reach or not
24 reach in this case a conclusion and say that you could and
25 here was the time of death.

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1 Q And were you aware of the possibility of opening
2 the door?
3 A Well, there is always a danger that she is going
4 to say if you look at something in a little bit different way

it could lead to this or that conclusion.
Q with respect to the challenge to the array, the panel as a whole, when you began your representation in the Wiggins case were you familiar with attempts to challenge the array in Baltimore County by other attorneys, whether in your office or private defense attorneys?
A I think that there was a death penalty case that had done it full scale prior to the Wiggins case but I don't recall what case that was.
Q And do you recall whether that was challenge?
A My recollection is that it was not.
MS. BROBST: Thank you, nothing further.
REDIRECT EXAMINATION
MR. VERRILLI:
Q Mr. Schlaich, let's talk about Dr. Korrell a little more. You testified as I heard you a couple minutes ago that there would be no tactical advantage to cross-examination of the medical examiner on time of death because she didn't give a time of death?
A My recollection is that she could not reach a

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conclusion.
Q Right. So there would be no tactical advantage because of that, is that correct?
A Right.
Q And, well, perhaps you could explain why you did cross examine her at guilt/innocence at time of death?
A I don't know if I did.
Q You know there would have been no tactical advantage to doing so but you don't know if you did it or not?
A I don't recall.

Q You remember there was no tactical advantage of doing it but you don't remember whether in fact you did it?
MS. BROBST: Objection.
THE COURT: Overruled.
A No.
Q Now let's go to sentencing. You testified a moment ago that there was expert medical testimony as to time of death at sentencing, correct?
A That is my recollection.
Q You testified about that a minute ago, correct?
A Um-hum.
Q Now, I take it that the tactical advantage that you described with respect to guilt and innocence wouldn't have any application at sentencing because there was expert testimony from the State about time of death at sentencing,

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right?
A Could you restate your question?
Q I take it that the tactical advantage that you agreed was present with respect to guilt/innocence because there hadn't been definitive testimony as to time of death at guilt/innocence wouldn't apply at sentencing because there was testimony from the State's expert as to time of death at sentencing, right?
A My recollection is that the time of death was not from Dr. Korrell at sentencing, it was from her boss.
Q There was expert testimony from a State pathologist at sentencing as to the time of death, correct?
A That is what I recall.
Q And the information that Michelle Nethercott had learned from her interview with Dr. Korrell which she had informed you about was inconsistent with that testimony at

17 sentencing, correct?
18 A That is not what I recall.
19 Q What do you recall?
20 A My recollection is that her information was from
21 a conversation with Dr. Korrell and not the other medical
22 examiner who testified.
23 Q That is what I asked you. The information that
24 Michelle Nethercott imparted to you about what court of law
25 informed her as to time of death was inconsistent with the

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1 testimony given by the State's other expert at sentencing,
2 correct?
3 A Yes.
4 Q And despite that you didn't call Michelle
5 Nethercott as a witness at that point after your tactical
6 reason evaporated, did you?
7 A I didn't call her as a witness at that point.
8 Q Despite the fact that your tactical reason
9 evaporated, you didn't call her, did you?
10 MS. BROBST: Objection. Asked and answered.
11 THE COURT: Overruled.
12 A I don't understand why I would want to call Miss
13 Nethercott. She is not an expert in that field. All she can
14 say is that Dr. Korrell told her she couldn't reach a
15 conclusion, whereas the doctor that had just been on the stand
16 said that she could.
17 Q Let's clarify a few things. The doctor on the
18 stand was an agent of the State, correct?
19 A Well, we hope not, but I consider them to be.
20 Q In the employ of the prosecution for purposes of
21 this case?
22 A Right.

23 Q So any admissions made by Dr. Korrel could be
24 attributed to the prosecution for purposes of this case?
25 A Yes.

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1 Q So not only did you fail to put Michelle
2 Nethercott on the stand after this transpired, you also failed
3 to cross examine Dr. Korrell who was on the stand at
4 sentencing about this conversation?
5 A I really don't recall whether I questioned Dr.
6 Korrell at sentencing.
7 Q You don't remember?
8 A I don't remember.
9 Q Okay.
10 A Now, in terms of the decision to go to the judge
11 rather than the jury at guilt and innocence, you testified, if
12 I remember correctly, that you thought Judge Hinkel would be
13 able to look past the race issue; that was one of your reasons
14 for opting for the judge?
15 A Not solely the race issue. I looked at it in
16 several factors offered together.
17 Q I'm asking if that was one of your factors?
18 A Yes.
19 Q I take it from that assertion that you were
20 concerned that the jury, had you chosen a jury at
21 guilt/innocence, might be influence by racial factor as one of
22 the reasons you opted for a judge?
23 A I think that I was concerned about them being
24 disturbed by the racial factor in conjunction with the fact
25 that the person was elderly and suffered some kind of bizzare

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death.
Q By the racial factor let's speak plainly here.
The fact is that it was a black man who killed an elderly white woman; that is what you were worried about?
A That is one of the things.
Q So that is one of the reasons you thought it would be better to go with the judge?
A Yes.
Q Despite that you never made an objection at the guilt/innocence phase of the proceedings to the jury composition on the ground that African Americans are systematically excluded, despite that concern you never made that objection?
A I don't recall making that objection, no.
Q In terms of the law that governs the sentencing phase, the capital sentencing phase, the law of the Supreme Court and this State, are you aware of the principle of 8th Amendment law?
MS. BROBST: Objection. Exceeding the scope of cross.
MR. VERRILLI: Not until you know my question.
THE COURT: We have a little thing going here. Let me hear the question.
Q Are you aware of the principle of 8th Amendment law that says legitimate mitigating evidence cannot

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permissibly be argued as aggravating evidence by the prosecution?
MS. BROBST: Objection.
THE COURT: Do you know anything about that?

THE WITNESS : No.
MR. VERRILLI : Thank you. Nothing further.
MS. BROBST: Nothing further.

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[WITNESS: MICHELLE NETHERCOTT]
BY MR. VERRILLI:
Q Miss Nethercott, are you an attorney licensed to practice law in the State of Maryland?
A Yes, I am.

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Q Can you give us your employment history since you became a member of the bar?
A Graduated from law school in 1984. I should have my CV in front of me. I believe I passed the bar in 1985. I'm not sure of the exact month. After I graduated from law school I spent one year with the Office of the Appellate Defender in South Carolina doing appellate work. I then clerked for a Judge Swelb. He is now on the District of Columbia Court of Appeals. At that time he was a trial judge in the District of Columbia courts.
I following that was employed by the Legal Aid Bureau for roughly a year and a half, a little under two years. I was assigned there to a division of the Legal Aid Bureau known as the Prisoner Assistance Project where I did civil and administrative legal work. And in January of 1988 I joined the Office of the Public Defender and was assigned to Baltimore County which is where I have been employed since that time.
Q Did you represent Kevin Wiggins in his trial in

this case?
A Yes, I did.
Q How many capital trials had you had before you represented Mr. Wiggins?
A None.
Q How long had it been since you started public

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defender service that you began to work on Mr. Wiggins case?
A Well, I began with the Office of the Public Defender in January of 88. I will have to confess to all, I don't think I'm going to be able to give exact dates. It was some time ago. I believe it was right around the time or slightly I guess prior to his indictment on these charges that I was assigned to the case. I don't think I had been with the office -- I think it was less than a year.
Q Okay. And you testified that you hadn't worked on any capital trials prior to that?
A Not capital trials. I had been involved in working on capital appeals in South Carolina, doing legal research on appellate court.
Q But no trial work?
A No.
Q Okay. How many felony jury trials had you done before you began your representation of Mr. Wiggins?
A I believe I had had -- well, I know I had had one. I remember clearly it was a subsequent offender, three time loser case and I had co-counsel in that case but I did do roughly half of the trial. It is possible I had one other jury trial, although I'm just not positive about the date. But it was no more than that. I had very limited jury trial experience at the time.
Q Okay. You had a co-counsel in Mr. Wiggins's

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case as well?
A Yes, I did.
Q That was?
A Carl Schlaich.
Q And I gather that there came a time that Mr. Schlaich left the Baltimore County Public Defender's office and went to a different office, is that right?
A Yes, he went to the Harford County Office of the Public Defender.
Q Okay. And during the period before he departed for Harford County, in terms of percentage volume, about how much of the trial preparation work did you perform and about how much did Mr. Schlaich perform?
THE COURT: He is talking about the Wiggins case only.
MR. VERRILLI: Thank you.
A It is hard to give a very firm estimate of that. We did different things. He was lead counsel on the case in the beginning. My primary -- at the beginning I primarily followed directions. I did a lot of legal research. I prepared motions. I think I probably prepared the bulk of the motions filed in the case. I was not involved in the process of securing experts. He would tell me -- I mean I would hear from him --
Q He did that?

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A Yes.
Q He testified it was about fifty/fifty. Do you agree with that?
MS. BROBST: Objection.

THE COURT: Sustained.
Q Was it about fifty/fifty before he left for
Harford County?
A I guess that is a reasonable approximation.
Honestly, I can't speak to how much of his schedule he
devoted.
Q After he left for Harford County did you assume
more of the burden?
A Yes.
Q Considerably more of the burden?
A Yes.
Q Okay. Let's start with the trial itself, the
guilt/innocence trial. As you understand it, what was the
prosecution's theory of the case at guilt and innocence?
A As I understand it, the prosecution's theory of
the case was that Kevin Wiggins, who was employed I believe by
a subcontractor that was working at this apartment complex
where Miss Lacs who was the victim of the crime lived, my
understanding of the theory was that he had gone in there on I
believe it was the 15th of September. Again, I can't vouch
exactly for these dates. It has been a long time. And that

they were proceeding on a felony murder theory which also
qualified him for the death penalty and the theory was that he
had gone in there and killed her in the course of robbing her.
Q Okay. On the 15th of September?
A Yes.
Q And that is 1988?
A Yes.
Q What was the defense theory?
A Well, the defense theory was that -- it had come
to my attention after going through some discovery materials

provided to me that there was a woman who was a friend of Miss
Lacs, I believe her name was Vassar, Edythe Vassar, I believe,
who had evidently told the police -- I believe Miss Lacs body
was discovered on the 17th.
THE COURT: Her what was discovered?
THE WITNESS: Her body. Apparently Miss Vassar
had told the police on the 17th, some time in close proximity
to just after the body had been discovered, that she had
spoken with Miss Lacs the day before, on the 16th, which
obviously was inconsistent with her being dead on the 15th.
So that was obviously an issue in the case not
only as to the State's theory of criminal agency but as to the
first degree issue in sentencing.
Q Was it also your theory that she was not dead on
the 15th, Miss Lacs, is that your defense theory, because of

that conversation on the 16th?
A Well, it was that and we also had retained an
expert by the name of Rudiger Breitenecker who was an expert
in forensic pathology. We had taken all of the materials
received in connection with the autopsy and reports and had
consulted him with respect to his opinion on time of death and
he, when he spoke with us, had supported our theory with
respect to the time of death issue.
Q Okay. And the theory was that the time of death
had to be after the 15th, is that right?
A Yes.
Q Was Miss Lacs body found in her apartment?
A Yes, it was.
Q Was there any evidence introduced at trial that
Kevin Wiggins ever entered that apartment?
A I don't believe so. I believe the State

17 produced evidence that a teenage -- I think it was a teenage
18 girl who had identified him as being in a hallway area, sort
19 of across the way from Miss Lacs apartment. I don't think
20 anybody -- I have no memory of any evidence that he enetered
21 the apartment.
22 Q Was there any fingerprint evidence in the
23 apartment indicating that Kevin Wiggins had been in the
24 apartment?
25 A No.

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1 Q Was there any fingerprint evidence indicating
2 that other people had been in there?
3 A I believe there were latest prints recovered
4 from the scene which if my memory serves me correctly were not
5 accounted for.
6 Q But they were accounted for to the extent that
7 they didn't match Kevin Wiggins?
8 A Yes, but not otherwise identified.
9 Q Were any hair or clothing samples found in Miss
10 Lacs apartment?
11 A I'm sorry. Hair or what?
12 Q Clothing samples.
13 A No, not that I'm aware of. I know there was a
14 cap recovered behind the door and I believe -- I may have
15 filed motions or I may have asked people in the Crime Lab with
16 respect to whether there were any hairs or fibers recovered.
17 I believe I was told there were not.
18 Q Okay.
19 A I know that the police had made efforts to
20 connect Mr. Wiggins to that hat, but that that had not been
21 successful.
22 Q Okay. Now, I take it from your testimony before

23 that time of death was a very important issue at the trial?
24 A Well, in my view it was.
25 Q And in your view it was an important issue?

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1 A Yes.
2 Q Very important?
3 A Yes. I mean, it was essentially the gravamen of
4 the defense.
5 Q Okay. I'm going to hand you a document that has
6 been marked for Identification as PC-Number 5. I ask you to
7 take a look at that for a moment. Have you had a chance to
8 review it?
9 A I haven't read the whole thing.
10 MR. VERRILLI: Your Honor, I believe this
11 document is already a matter of record in these proceedings.
12 THE COURT: Do you remember seeing this before?
13 THE WITNESS: It looks familiar. It is the
14 affidavit in support of the search and seizure warrant.
15 MR. VERRILLI: I propose to ask the witness some
16 questions.
17 THE COURT: She says she is familiar with it. Go
18 ahead.
19 MR. VERRILLI: Thank you.
20 Q Miss Nethercott, could you read the first
21 sentence of the second paragraph on the first page -- I'm
22 sorry. Before we do that let's identify this for the record.
23 What is this document; what does it appear to be?
24 A It appears to be an affidavit in support of an
25 application for search and seizure warrant.

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Q Who signed the affidavit?
A It was signed by a Detective Crabbs.
Q Is that a signature under oath?
A Yes.
Q Okay. Now can you tell that from the document?
A Because it says below his signature, "sworn to me and subscribed to me in my presence, this 7th day of October, 1988." And a signature line below that, Judge Brennan.
Q Doesn't it say the 17th day of October?
A Yes.
Q Okay. And that is on page 5 of the document?
A Yes.
Q Okay. So this document is an affidavit by Detective Crabbs. Could you now read that first sentence and in the second paragraph on the first page?
A "Between the hours of 10:30 a.m. on September 16th, 1988 and 1:30 p.m. on September 17th, 1988 Florence Georgiana LaxLacs's was" and then there is a phrase that is crossed out, "sexually assaulted and murdered by being forcibly drowned and physically -- do you want me to keep going?
Q That is enough. That says that Miss Lacs was murdered between the hours of 10:30 a.m. September 16th and 1:30 p.m. on September 17th?

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A That is what that says.
Q It is a sworn assertion?
A Yes.
Q Is that statement inconsistent with the

prosecution's theory of this case?
A It would seem to be.
Q Because?
A Because my understanding of the theory was that the murder and the robbery had occurred at the same time and the only evidence placing Mr. Wiggins near the crime scene was on the 15th.
Q Okay. Now, was that statement that the murder occurred on the 16th or the 17th consistent with the defense theory of the case?
A Yes.
Q Okay. Do you recall Detective Crabbs testifying in this case?
A Yes, I do.
Q For the prosecution?
A Yes.
Q You didn't ask him about this statement?
A I don't recall whether I did or not. I would defer to the transcript.
Q Okay.
A I may not have.

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Q But you don't remember making a decision not to ask him about this statement?
A No.
Q And --
A I would assume I would ask him about it.
Q Could you repeat that?
A I said I would assume that I would have asked him about it.
Q Okay. Had you been aware of it, you would have asked him? Had you noticed that sentence you would have asked

him about it, is that a fair statement?
A Yeah. I mean, I would assume that I had noticed
it.
Q Okay. You don't recall whether you asked him
about it?
A I honestly don't recall.
Q Okay. And do you recall giving any
consideration to introducing this document as substantive
evidence in support of your case?
A No, I don't remember -- I don't recall -- no, I
do not specifically recall that.
Q Do you have any general recollections about
that?
A Not really, no.
Q Okay. Given that time of death was an important

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issue at trial, is it your opinion that expert testimony on
the time of death was important at the guilt/innocense phase?
A It was my opinion, yes.
Q Why do you hold that opinion? What is the basis
for it?
A Well, first of all I don't think that -- I mean,
as to a medical determination on time of death, it seems like
it is clearly something that is within the parameters of an
expert needing to speak to that issue, at least to determine
the physical condition of the body and various other
conditions that may have a bearing on it. Also because it was
-- it would have supported the testimony of a civilian witness
who was a friend of the victim's and not, in my judgment,
based on my interactions with her, someone who relished the
prospect of assisting the defense. But it clearly would
buttress any attack on a civilian witness that somehow she had

this wrong or her memory was impaired.
Q And that would explain why expert testimony
would be important to the defense case?
A Correct.
Q Did the prosecution put on expert testimony as
to time of death at the guilt/innocence phase?
A Well, they attempted to.
Q Who did they call as a witness?
A They called a medical examiner by the name of

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Doctor Margerita Korrell.
Q Okay. Did you have an occasion prior to the
trial at guilt/innocence to speak with Margerita Korrell?
A Yes, I did.
Q Do you remember exactly when that was?
A I don't recall the exact date. I think
initially Mr. Schlaich and I had intended to go down and speak
with her together. It never worked out scheduling wise.
Again, I don't recall the exact date but it was sometime
within roughly two to three weeks prior to the trial date I
did go down. I met with her at the Medical Examiner's office
and I discussed this issue with her.
Q Okay. I'm going to show you a document which
has been marked for Identification as PC-6. I would ask you
to take a minute and review that, please.
A These are my notes.
Q Could you identify this document for the record?
A There are four pages of notes which aren't kept
as well as they probably should have been.
Q Did you prepare these notes?
A Yes, it is my handwriting.
Q When did you prepare the notes?

23 A The notes are dated 18th of July of 89.
24 "Meeting with Dr. Korrell at the Medical Examiner's Office."
25 Q Okay. Does that mean that you prepared the

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1 notes on the 18th of July, 1989?
2 A Assuming I wrote the date down correctly.
3 Q Okay. Now, does this document refresh your
4 recollection as to when that meeting with Dr. Korrell
5 occurred?
6 A I assume it would have occurred on the 18th.
7 MR. VERRILLI: Your Honor, I would at this time
8 move the admission of this document into evidence.
9 MS. BROBST: Objection.
10 THE COURT: Overruled. Put it in.
11 (WHEREUPON, the above referred to document was
12 entered in evidence as Petitioner's Exhibit
13 Number 6.)
14 Q Can you describe the substance of your
15 conversation with Dr. Korrell on the 18th of July, 1989?
16 A Well -- yes, I can.
17 Q Could you do so, please?
18 A I --
19 Q Let me start with the background. Did you go
20 see Dr. Korrell?
21 A Yes, I did.
22 Q Was that at her office?
23 A Yes.
24 Q Now, can you describe the substance of the
25 conversation that occurred at her office on the 18th of July,

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1 1989?
2 A Well, I talked with her about the autopsy that
3 she had performed on Miss Lacs. I reviewed with her the notes
4 of Dr. Felzenberg who was the local medical examiner who would
5 have been the first on the scene from the Medical Examiner's
6 Office to examine the body and I assume to pronounce the
7 person dead and make arrangements to have the body transported
8 to the Medical Examiner's office. I went over with her the
9 contents of that.
10 I went over with her -- I asked her whether it was
11 possible for her to render an opinion regarding the time of
12 death. I went over with her the various considerations that
13 would go into that. I asked her if she had an opinion on it
14 and she said she did.
15 Q Did she express an opinion to you?
16 A Yes, she did.
17 Q What was the opinion she expressed? This is on
18 the 18th of July, 1989.
19 A She indicated to me that in her judgment the
20 victim could not have been dead more than twenty-four hours
21 from the time of the discovery of the body.
22 Q Do you remember when the body was discovered?
23 A I have written in my notes approximately 4 p.m..
24 Q On what date, do you know?
25 A On the 17th.

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1 Q Okay. So is it an accurate recap, the testimony
2 you just gave, that Dr. Korrell told you at this meeting on
3 the 18th of July that the victim, Mrs. Lacs, could not have
4 been dead more than twenty-four hours before 4 p.m. on the

5 17th? In other words could not have been dead before 4 p.m.
6 on the 16th?
7 A Yes.
8 Q Okay. Was she definitive about that?
9 A Yes. She didn't express any ambivalence. In
10 fact, I asked her. I repeated the question. I said I wanted
11 to be sure. And she didn't express any reservation.
12 Q I just want to make sure --
13 THE COURT: Could not have been dead more than
14 twenty-four hours before 4 p.m. on the 16th.
15 MR. VERRILLI: On the 17th, Your Honor.
16 THE COURT: Okay. Let me see. On 9-17-89.
17 MR. VERRILLI: Right. That was the date the body
18 was discovered.
19 THE COURT: Fine. When did you meet with the
20 doctor?
21 THE WITNESS: Your Honor, I don't recall the
22 exact date. I would assume that I met with her on the 18th,
23 which is what --
24 THE COURT: The 18th of?
25 MR. VERRILLI: Of July.

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1 THE, COURT: Which is the first date on the top of
2 your notes?
3 THE WITNESS: Yes, assuming I wrote the date down
4 correctly.
5 THE COURT: Thank you.
6 Q Now, I want to make sure this is clear. Did Dr.
7 Korrell tell you at this meeting on the 18th that she just
8 couldn't tell what time of death was?
9 A No, she never indicated that.
10 Q So it was not her assertion to you that she just

11 couldn't tell?
12 A No.
13 Q She thought she could tell?
14 A Yes, she gave me the opinion. She stated it at
15 least twice, if not three times.
16 Q That opinion was unequivocal?
17 A At that time, yes.
18 Q It was reflected in these notes that you made
19 contemporaneous?
20 A Correct.
21 Q Did you have another occasion to talk to Dr.
22 Korrell prior to trial?
23 A Yes, I did.
24 Q Do you remember when that was?
25 A Dr. Korrell called me shortly after that

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1 meeting. My notes reflect here it was the 20th, which would
2 have been two days later. She called me at my office and was
3 extremely agitated and she was somewhat difficult to follow,
4 but the essence of the conversation was that she had discussed
5 this autopsy with her supervisor and that she was retracting
6 the opinion that she had given me with respect to the time of
7 death in this case.
8 She wouldn't -- when I asked her why this -- what
9 had occasioned this reconsideration of the issue she wouldn't
10 answer how it came about. I asked her several times at whose
11 initiative did it come about and she wouldn't answer.
12 Q Okay. Now, did Dr. Korrell in fact testify for
13 the prosecution at the guilt/innocence phase?
14 A Yes, she did.
15 Q And do you recall what testimony she gave with
16 respect to time of death at the guilt/innocence phase?

17 A My recollection is that she testified it was
18 impossible to give such an estimate.
19 Q Is that --
20 A Or that -- I don't want to misstate it, but in
21 effect she was not able to render an opinion. She could not
22 render an opinion on this question.
23 Q In your judgment, Miss Nethercott, did the
24 statement that Dr. Korrell made to you on July 18th contradict
25 the testimony that she gave at trial at the guilt/innocence

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1 phase?
2 A You mean the statement that she made to me at
3 the Medical Examiner's office?
4 Q The statement made on July 18th reflected on
5 Page 1 of your notes on this document, did that statement
6 contradict the statement and testimony that she gave in the
7 trial?
8 A Yes, in my judgment it did.
9 Q Now, did you give any consideration to serving
10 as a witness for Mr. Wiggins on the question of Dr. Korrell's
11 prior contradictory statements as to time of death?
12 A Well, yes, I did give the matter consideration.
13 What happened was once I found out that this retraction had
14 occurred -- before this meeting with her, when I spoke with
15 Dr. Breitenecker, he had advised me that he was willing to
16 testify on the time of death issue but he didn't think it
17 would become necessary because he did not anticipate that the
18 Medical Examiner's office would have an opinion that differed
19 substantially from his.
20 When I learned of this change in Dr. Korrell's
21 opinion I contacted Dr. Breitenecker who at that time apprised
22 me that he did not intend to testify.

23 Q Did he explain why not?
24 A Not very clearly. He made a comment about his
25 involvement in serving for, doing rape examinations for the

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1 State Attorney's office. He didn't say that was the reason.
2 He mentioned that and just basically said he wasn't -- he
3 didn't want to be involved in testifying.
4 Q Okay. We are going to go into that subject more
5 in a minute. I'd like to stay focused on the fact that you
6 considered giving testimony.
7 A That is what occasioned --
8 Q At that time you considered whether you should
9 testify as a witness, is that right?
10 A Yes.
11 Q Okay. Did you in fact testify as a witness at
12 trial?
13 A No, I did not.
14 Q Why did you decide not to?
15 A Well, I was concerned about what had happened.
16 If I can, at least from my perspective -- at this point I was
17 less than three weeks away from trial and in a capital
18 homicide which at that point represented at least maybe my
19 second or, possibly, if I'm wrong in my recollection, there
20 was one more, my third jury trial. I was handling the bulk of
21 the case at that point. I was frankly overwhelmed and very
22 shortly before the trial date the essence of the defense
23 appeared to be literally falling apart. I had gone from a
24 situation where I had an expert who I thought would be
25 agreeing with the State's expert and supporting the testimony

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of a civilian witness to a situation where I didn't have that at all. And I was concerned about the whole manner in which this had occurred with Dr. Korrell and --
Q When you say that, you mean her changing her mind?
A Yes, I was concerned enough that I discussed it with Mr. Saunders who was the District Public Defender for Baltimore County at that time. I mentioned -- I discussed with him at that time.
There were other things that had occurred in the case and seemed as though I was getting dangerously into a situation where I was in effect becoming a witness.
Q On this issue of time of death?
A Correct.
Q Okay. And did you discuss that with Mr. Schlaich, your co-counsel?
A Yes.
Q And did you eventually reach a decision that you would not offer this testimony as to time of death, you personally?
A Well, I was operating on the assumption, which may be incorrect, that I could not function both as counsel and as a witness. I at that time, given everything that was occurring in the case, it seemed to me that in the first place probably a postponement request would have been a logical

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thing to do.
Q Did you do that logical thing?
A No, I did not.
Q Okay. I'm sorry. Did you want to keep going?

Let me ask you this. Did you -- you said that you assume that you would have to recuse if you were to serve as a witness on this issue?
A Yes.
Q Did you research that question before making a decision?
A No.
Q Did you look at the Maryland Rules of Professional Conduct?
A I don't recall doing that. I think frankly I saw that as just a practical, just not something that practically speaking was viable.
Q But you didn't look into it. So you don't know what Maryland ethics rules are in that regard, of whether a lawyer can continue to represent a client and also serve as a witness?
A Well, my understanding was that that is generally not approved of.
Q But do you know what Maryland Rule of Professional Conduct 3.7 says?
THE COURT: Did you look at it at the time?

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THE WITNESS: No, I didn't, Your Honor.
THE COURT: You don't know what it says?
THE WITNESS: I can't quote it for you.
THE COURT: It says a lot different than what it said then. Go ahead.
Q In deciding this question of whether you should be a witness or not, whether it would force a recusal, did you factor in that this was going to be a Judge trial rather than a jury trial with respect to guilt and innocence?
A My testifying?

11 Q Yes. Did that have any bearing on your
12 consideration of whether you would be forced to recuse?
13 A Well, no. I think more the issue with respect
14 to my recusal was -- I think it had to do with the issue of
15 getting the case postponed. At that time I had taken primary
16 responsibility for preparation of the case on guilt/innocence
17 and --
18 THE COURT: Here is his question. You didn't
19 look at the rule?
20 THE WITNESS: That's correct.
21 THE COURT: So you are not aware of whether the
22 former rule differentiated in determining whether a lawyer
23 should testify as to whether it is a judge trial or a jury
24 trial?
25 THE WITNESS: That's correct, Your Honor. I did

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1 not research it.
2 Q Remember now, you also said that you had the
3 opinion and feeling that it was wrong?
4 A Yes, for reasons other than ethical reasons. I
5 didn't see it as --
6 THE COURT: All right. But any reasons that you
7 had in your head and your heart, were those reasons the same
8 whether it would be a judge trial or a jury trial? Did it
9 matter in your reasoning as to whether or not it would be a
10 judge or jury trial that you would not testify and be an
11 attorney at the same time? Did you give any of that any
12 consideration?
13 A I think it would have occurred to me that it
14 would be particularly awkward in front of a jury.
15 Q But you were proceeding in front of a judge?
16 A I don't know at that time that decision had been

17 made.
18 Q Okay. Anyway, let's skip ahead a little bit.
19 Dr. Korrell's admission to you was never introduced as
20 evidence at the guilt/innocence phase?
21 A I don't believe it was.
22 Q Nor at the sentencing phase?
23 A No.
24 Q In fact, Dr. Korrell wasn't even cross examined
25 about that prior statement, was she?

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1 A I don't believe she was. I don't believe I
2 conducted the cross-examination of Dr. Korrell.
3 Q Who did?
4 A I believe Mr. Schlaich did.
5 Q Can you describe the circumstances surrounding
6 that, the decision to have Mr. Schlaich do it?
7 A Well, I was taking the primary responsibility
8 for the conduct of most of the examination of the witnesses.
9 I was operating on the assumption that I would do the
10 cross-examination of Dr. Korrell and he indicated to me
11 shortly before she testified that he was going to conduct
12 cross-examination.
13 Q How soon before?
14 A I think it was literally just really as we were
15 sitting at counsel table, I believe.
16 Q When Dr. Korrell was testifying on direct
17 examination?
18 A Yes.
19 Q That is when you became aware that he was going
20 to --
21 A No. As she took the witness stand.
22 Q I see. And your recollection is that Mr.

23 Schlaich did not question her about this prior admission?
24 A That is my recollection. Again, I would defer
25 to the transcript.

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1 Q Okay. Do you think, Miss Nethercott, that it
2 was important for Mr. Wiggins to have expert testimony for the
3 defense with regard to time of death? If you had proceeded by
4 jury trial instead of by judge trial at the guilt/innocence
5 phase of these proceedings, would Mr. Wiggins have had the
6 benefit of an expert with respect to time of death?
7 A Well, he wouldn't have unless we had gotten a
8 postponement of the trial date.
9 Q Can you explain why that is?
10 A After this -- after Dr. Korrell's refashioning
11 of her opinion and our expert announcing that he wouldn't
12 testify, I basically began telephoning all over the country in
13 an effort to locate a forensic pathologist who could render an
14 opinion on the matter. The only person I was able to locate
15 was an individual whose scheduling was not available during
16 the relevant period of time that would have run or our best
17 estimate would have run if we had elected a jury.
18 Q Was that Dr. Kaufman?
19 A Yes.
20 Q Just so I understand your testimony correctly,
21 if you had gone with a jury trial instead of a judge trial,
22 Dr. Kaufman wouldn't have been available?
23 A That was clearly my understanding, yes.
24 Q You didn't have any alternative to Dr. Kaufman?
25 A No.

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1 Q Did you consider seeking opinions at that point
2 to get an expert who could testify --
3 A Did I consider it? Yes.
4 Q But you didn't do it?
5 A No.
6 Q Why not? You mean the defense team didn't do
7 that?
8 A No.
9 Q Okay. You did, I take it, recommend to your
10 client that he seek a judge, go with a judge trial rather than
11 a jury trial?
12 A Yes.
13 Q And was your inability to line up an expert
14 witness in the event your client wanted a jury trial a
15 material reason for you giving that advice to your knowledge?
16 A It was in my judgment.
17 Q Was it a material reason?
18 A Yes.
19 Q Did you put any pressure on Mr. Wiggins to make
20 the decision to opt for judge trial other than jury trial?
21 A I don't know what you mean by pressure. We
22 encouraged it, yes.
23 Q How strongly did you encourage it?
24 A Well, frankly I didn't do most of the talking
25 during that conversation.

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1 Q Were you present?
2 A Yes, I was.
3 Q Well, what happened? How strongly was it
4 encouraged?

A It was encouraged.
Q Strongly?
A I would -- yes, I would say strongly is a fair characterization of it.
Q Based on your prior experience dealing with Mr. Wiggins do you think that he was vulnerable to pressure from you, from his attorneys?
A I think Mr. Wiggins had a very limited -- it became obvious to me as my contacts went on that he had I think a cognatively or intellectually limited appreciation of the situation. To that extent I think there was some vulnerability.
Q So was that a yes answer to my question?
A In that sense, yes.
Q Okay. I'd like to turn now to the jury composition issue.
THE COURT: Wait a minute now. Wiggins had cognative limitations, so yes as to the pressure. All right. What is the issue?
MR. VERRILLI: Jury composition.
THE COURT: What number?

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MR. VERRILLI: I'm sorry, Your Honor. This would be an ineffective assistance of counsel claim both with respect to guilt and innocence, which is number 8 and I guess this is number 9 with respect to guilt and innocence and then 36.
THE COURT: Systematic exclusion of African Americans from the jury selection process.
MR. VERRILLI: Right. This also goes to claim number 36, Your Honor, 36 D in particular.
THE COURT: 36 what?

MR. VERRILLI: D as in David.
THE COURT: 36 D is counsel failed to investigate the case properly and produce information as to the systematic exclusion of African Americans.
MR. VERRILLI : Right.
THE COURT: 9 is there was a systematic exclusion of African Americans from the jury selection process utilized in Baltimore County at the time of the trial. So far I see Mr. Schlaich's testimony on that point. All right. Go ahead.
MR. VERRILLI: Thank you.
Q The defense entered an objection at the sentencing phase of the proceeding to the systematic exclusion of African Americans from the jury pool, is that right?
A Yes.
Q But the defense did not submit any evidence in

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support of that claim?
A That's correct.
Q And that is because the defense did not develop any evidence as far as that?
A That's correct.
Q And the defense understood that that claim was meritless unless there was evidence to support it?
A Yes.
Q But nonetheless the defense didn't develop the evidence?
A That's correct.
Q And there was no rule or regulation of the Public Defender's Office that prohibited the defense from developing that evidence?
MS. BROBST: Objection. Relevance.
THE COURT: Overruled.

A Not that I'm aware of. I recall raising that
issue as an issue that I was aware of. I recall there was a
discussion between Mr. Schlaich and I about that and my
recollection is that he had indicated that in a recent case,
some recent capital case, that some type of study or
investigation had been done with respect to this and that it
had not yielded anything and therefore that it wouldn't be
something that would be productive. But we both realized that
that claim would not be preserved without an evidentiary

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showing.
Q Did you get that other study from the other case
that Mr. Schlaich referred to?
A No. Well, I never saw it. I can't speak for
him.
Q Now, there are funds available to hire an
expert to do a study, correct, funds available from your
office?
A As far as I know, yeah.
Q And did any of your superiors in the Public
Defender's Office forbid you from developing a study?
MS. BROBST: Objection. Relevance.
THE COURT: Overruled.
A No, not that I was aware of.
Q Okay. Let's turn now to the issue of mitigation
and sentencing.
THE COURT: Okay. What number?
MR. VERRILLI: This would be number 36 A, 36 B,
36 C.
THE COURT: I have 36 C, D and E but nothing
else.
MR. VERRILLI: I'm sorry --

THE COURT: Wait a minute. That is just my
expanded copy. The ones I handed out to you, we expanded
those. Here it is. 36 A. Counsel failed to introduce

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evidence showing the petitioner was mentally ill, homeless and
a victim of a horrible childhood.
What else is there, B?
MR. VERRILLI: B and C.
THE COURT: Counsel failed to conduct an adequate
investigation of the case to develop -- what is wrong with
that?
MR. VERRILLI: Shouldn't be an E at the end of
develop, I guess.
THE COURT: Evidence of mental retardation. The
homeless -- I wonder why the word processor didn't pick that
up? I don't know. The homeless living condition of the
petitioner and his horrible childhood. Counsel failed to
introduce available expert testimony on the issues of mental
retardation, homelessness and horrible childhood of the
petitioner. All right.
MR. VERRILLI: Okay.
Q It is correct, is it not, Miss Nethercott, that
the defense team did not develop a social history of Mr.
Wiggins in preparation for sentencing phase of these
proceedings? Let me ask it this way. It is correct that the
defense team didn't hire a forensic social worker to do a
social history?
A I don't believe so.
Q Okay. And funds were available for that purpose

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from the Public Defender's office?
A I would assume. I was -- as I said earlier, I
was not -- I really did not have any role in seeking funds
or seeking persons to do the expert --
Q That was Mr. Schlaich's responsibility?
A I don't have any information to suggest there
was.
Q That was Mr. Schlaich's role?
A Yeah. I was not involved in that.

* * * *

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[WITNESS: MS. NETHERCOTT; BY MS. BROBST:]
Q No social worker or psychiatrist or psychologist
were called to testify in this case regarding the defendant's
background at sentencing, is that correct?
A You said social worker or?
Q Psychiatrist or psychologist?
A Correct.
Q Have you in your experience seen or been
involved in a case in which social background of the defendant
has backfired on the defense?
A Have I personally been involved in that?
Q Or observed?
A Yes.
Q And when a social workup is done and testified
to, the State has an opportunity to cross examine of course,
is that correct?
A Sure.
Q And often will bring out every bad thing the
defendant ever did regardless of whether it resulted in a

conviction, is that correct?
A I'm sure that is usually what they would hope to

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do.
Q Okay. And you felt, you testified on direct,
that the time of death was the most important consideration in
the defense case, is that correct?
A Given the defense strategy that we had adopted,
yes, it clearly was.
THE COURT: And just to make sure. I asked this
question once before. But the time of death was important
because of the ability or not of the State to put Mr. Wiggins
near the crime scene?
THE WITNESS: Well, the importance was that they
would have to put him at the crime scene at a time that was
consistent with her dying. The problem was they put him at
the crime scene on the 15th. The evidence on time of death
suggested that she was alive beyond the 15th. So it created
problems both on guilt/innocence and as to principalship.
THE COURT: But again, the issue of time of death
had to do with their ability to put him at the crime scene at
that time? In other words, if the time of death was one
thing, they couldn't put him there. If the time of death was
another thing, then they could put him there?
THE WITNESS: Yes, if I understand your question,
yes. If they could have her dead at the one time they were
able to put him there, which was the 15th, that would be
consistent with the theory.

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THE COURT: So that was what the case was all

about, the State had testimony that they could put Wiggins there at a certain time, right?
THE WITNESS: At the apartment complex.
THE COURT: So this whole issue of death and the time of death had to do with a coordination of whether death occurred at or near the time they could put him at the crime scene?
THE WITNESS: Yes, whether the death was connected up into the same timeframe with any taking that may have occurred.
THE COURT: Because if they could put him at the crime scene only three days before the time of death, we probably wouldn't be here today, something like that?
THE WITNESS: The way this case went, Judge, I hazard to guess what would have happened.

* * * *

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In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
Post Conviction Hearing
Volume 4

March 29, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

* * * *

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THE CLERK: State your full name and current address for the record, please.
THE WITNESS: My name is Gerald Fisher. I'm an

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attorney and my office address is 419 7th Street Northwest Suite 201, Washington, D.C..
MS. BROBST: Your Honor, the State objects to the calling of this witness for reasons previous submitted on a motion in limine.
THE COURT: Which had to do with the fact that I'm supposed to be the one to make a determination as to whether someone has been incompetent or-not.
MS. BROBST: That's correct, Your Honor. That

this witness does not have an expertise available that would help in this case the trier of fact in any manner since the trier of fact is the trial judge of the Circuit Court for Baltimore County.
THE COURT: Well, I'm going to listen to him and let me explain why for the record. I sit here as far as I know probably as the trial judge who has handled more death penalty cases than any other judge in the State of Maryland. I have four. I don't know anybody else that has that many, do you?
MS. BROBST: No, sir.
THE COURT: So I have handled more than anyone else. But what has happened to me is that I have been acutely aware of the fact as I have been involved with this, as this is my second or third post conviction in a death penalty case, but I have become acutely aware that in this area more than

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any other area there is one big difference in sitting out here on the bench and making a judgment on matters as opposed to what should be done by an attorney in preparation for presenting those matters to the court.
I dare say that I am convinced that I am not an expert on the workup in the cases and what needs to be done. While I may have more trial experience than any other judge in the state in trying the case, I have come to understand through reading post conviction decisions that I am not an expert and do not have a good handle and a good grasp enough to be the sole judge as to what attorneys should do in evaluating a case and presenting sociological and psychological work-ups. For that reason this gentleman's testimony could be beneficial to me. I will listen to it.
DIRECT EXAMINATION

MR. VERRILLI :
Q Mr. Fisher, I have handed you a document which has been marked for Identification as PC-8. Do you recognize that?
A Yes, I do.
Q What is that?
A That is a resume that I have. I have a couple of different ones for different purposes, but that is my resume.
Q Did you prepare it?

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A Yes, I did.
MR. VERRILLI: I move the admission of PC-8.
MS. BROBST: No objection.
THE COURT: Put it in, please.
(WHEREUPON, the above referred to document was entered in evidence as Petitioner's Exhibit Number 8.)
Q Mr. Fisher, could you describe your educational background, please?
A Yes. I graduated from college in 1972 at the College of William & Mary. I graduated from law school and actually I completed class in 1977 and formal graduation was from 1978 from Catholic University law school, Columbus School of Law. That is it as far as formal education.
Q Are you a licensed attorney?
A Yes, I am.
Q In what jurisdictions?
A In several. I'm licensed to practice in Virginia, Maryland, the District of Columbia and I'm also licensed to practice in circuit courts in other jurisdictions: In the 5th Circuit, the 11th Circuit, 9th Circuit and 4th

22 Circuit, which takes us beyond Maryland and Virginia.
23 Q Okay. Can you give us your employment history
24 since law school, please?
25 A Yes. When I graduated for a few months I worked

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1 with a private attorney who specialized in criminal defense
2 work. Then beginning in the summer of 1978 I clerked with a
3 judge for the District of Columbia Court of Appeals, Judge
4 Walter Yeagley. I did that for approximately eleven months.
5 And then in 1979 I began working at the District of Columbia's
6 Law Students in Court program as a clinical supervisor. It
7 also provides adjunct professor status at a number of law
8 schools.
9 What that program does is third year law students
10 in the District of Columbia are allowed to practice law under
11 the supervision of attorneys who have been licensed to
12 supervise them. And I worked primarily with the criminal
13 division in the first years supervising and teaching criminal
14 law and criminal trial techniques to law students.
15 I have continued doing that, although I no longer
16 do it on a full-time basis. It is a part-time matter for me
17 now and what I do full-time is to practice privately in my own
18 law firm. I began doing that roughly in 1984.
19 I moved gradually from a full-time to a part-time
20 basis in the Law Students in Court program and then was going
21 into full-time practice. I have been doing that, again, since
22 approximately 1984 or 1985.
23 My practice is a litigation practice with the
24 emphasis on criminal law and with I guess you would call it a
25 sub-specialty dealing with capital punishment litigation.

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1 In addition, I teach independently of the Law
2 Students in Court program two courses at Georgetown's law
3 school, one is a trial practice course and it is both civil
4 and criminal, and the other is a course in capital punishment
5 and the Supreme Court. It is a substantive look at capital
6 punishment litigation.
7 Q Can you estimate for us the number of criminal
8 trials in which you have served as counsel?
9 A Cases of my own, probably forty to fifty. As a
10 supervisor in the Law Students in Court program I probably did
11 an additional one hundred or two hundred cases that we went to
12 trial.
13 I should explain. The way it works is the
14 supervising attorney is by obligation has to be co-counsel in
15 the case. So we would be co-counsel with the students. It
16 would be the students primary responsibility to conduct the
17 case but a lot of times that didn't work out that way. So we
18 had equal responsibility in terms of what went on with the
19 cases.
20 Q Okay. Can you now describe your litigation
21 experience in death penalty cases?
22 A Sure. Beginning in I think it was 1983 I
23 started to do work on post conviction capital cases in
24 southern states. And the way that that happened is that one
25 of the people I used to work with, an individual named Steven

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1 Bright, went down to Atlanta, Georgia and took over a program
2 there that exclusively dealt with capital litigation in
3 southern states both at trial and post conviction level,
4 although it was primarily post conviction then. I began to

work on some of those cases. Actually even before he left we had begun to co-counsel one case and then he left. We co-counseled another case and then I took a third case with another attorney and then was involved in several other post conviction cases.
Beginning in 1984 or 1985 I began to do capital cases in Maryland both at the trial, post conviction, appellate level. So I have been counsel in about four or five of those cases, counsel of record, and have been involved in probably another, I don't know, ten or fifteen Maryland cases and maybe an additional fifteen or twenty other post conviction capital cases in other states.
Q And in those cases that you are referencing did your work include preparation for trial at sentencing?
A Sure.
Q Go ahead.
A In the cases that we took at the trial level and even the cases we took at the post conviction level we had to do a lot of -- we did fundamental preparation for the cases. In the post conviction cases a number of them that we got involved in were cases where we were in the same

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setting you are here, and then subsequently won relief and went back and did the resentencing or retrial or whatever. So we had to go back and reprepare the cases for either sentencing or for trial.
In addition, even when we were doing the cases themselves just in their post conviction status, we would have to go back and to develop and prove up whatever claims we were making and that took preparation in the same way that you did trial or sentencing preparation initially.
Q Okay. You said you teach a course on capital

punishment at Georgetown Law School?
A Yes.
Q Tell us more about that case?
A Yeah. I think in 1986 I and one of my law partners, Robert Morin, began teaching a course in Georgetown. It is on -- its emphasis is on the Supreme Court decisions on capital punishment.
Part of what we do in the course is we also examine other Federal Court decisions and some state court decisions and then we also try to sort of layer over that a kind of practical lock at how these issues are resolved and how they are litigated at the trial and sentencing and post conviction levels. So we take really both a historical and a subject matter look at capital punishment and put it together as a course.

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We have second and third year students -- I think first year students aren't eligible for the course -- and a number of students at Georgetown who are in LLM courses who take the course.
Q Does your course cover the subject of ineffective assistance of counsel?
A Yes, it does.
Q Are you generally familiar through your litigation and teaching experience with case law, relevant case law in Maryland and from the Federal courts on the issue of ineffective assistance of counsel?
A Yes. In many ways because of that course, one of the subjects that we teach is an independent class which is ineffective assistance of counsel. So we spend a lot of time reading those cases, the ones that lead up to Strickland and what has led up to Strickland in Federal courts and then also

17 through that and through my own work I have read I think all
18 the post Strickland ineffective assistance of counsel cases,
19 at least the ones in capital punishment in Maryland and many
20 of the pre Strickland cases on capital punishments. So I am
21 familiar.
22 Q Which are those Maryland cases generally?
23 A There is Thomas versus State, Harris versus
24 State, Colvin, Trimble, Tichnel, Gillian, Bauers. There is
25 another case in there I think I may have missed. I think

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1 those are the primary ones from 1985.
2 Q Through your litigation and teaching experience
3 are you generally familiar with substantive 8th Amendment law
4 as it applies to the sentencing phase of a capital proceeding?
5 A Yes. Again, probably the primary place where I
6 learned the substantive law was through the development of the
7 class or at least I knew much of it before we put the class
8 together but with continuing emphasis on that. It really is
9 the primary theme throughout the class is the 8th Amendment
10 and its development and all its variables.
11 Then just in doing the capital litigation, it is a
12 fundamental aspect of doing capital litigation. You need to
13 know about that.
14 Q Could you identify some of those leading cases
15 from the Supreme Court?
16 A Well, you know the primary cases just in terms
17 of substantive 8th Amendment law are Furman in 1972 and then
18 in 1976 there is the five major cases, Gregg and Woodson,
19 Roberts, Jurrick -- what is my fifth case there? I can't
20 remember the fifth one for a moment. It will come back. Then
21 all of the development of the case law since then has been 8th
22 Amendment spinoffs and incorporating principles from other

23 areas, from due process, from the 14th Amendment, from the 5th
24 Amendment
25 Q Okay. And the case law on mitigation evidence

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1 at capital proceeding, are you familiar with those cases?
2 A Yes, again, from the first five cases that came
3 out in 1976, the case that really starts the seeds of that is
4 Woodson. Then there is the Lockett case in 1978; there is
5 Ettings which followed shortly after that and then we have
6 Penry (Phonetic) and Franklin and a number of other cases more
7 recently decided that deal with the presentation of mitigation
8 evidence.
9 Q Okay. Do you do any teaching in addition to
10 your Georgetown capital punishment course that involves issues
11 of criminal trial practice?
12 A Yes.
13 Q Would you describe those for us?
14 A I do a lot of teaching in CLE programs,
15 particularly in the District of Columbia. In fact I have to
16 teach one tonight on criminal trial practice and criminal
17 trial techniques in the District of Columbia and elsewhere.
18 I have been on some panels outside of the District
19 of Columbia as well. Plus every year for the last I guess
20 four years now I have gone up to Harvard University as part of
21 their trial advocacy workshop and taught third year students
22 there. They bring in attorneys throughout the country to do
23 that.
24 In addition, I have been on some panels that deal
25 more specifically with capital punishment litigation, one or

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two instances in Maryland and then I have done them at the Earleigh conference, which is the national conference of people doing capital punishment litigation. It is held -- I have been going since 1983 and have been on several panels there. I have also taught on panels and seminars down in Georgia and other southern states.
Q Okay. Let's talk a little bit more specifically about the conferences in Maryland that you have attended. You you were here yesterday for Mr. Schlaich's testimony?
A Yes.
Q And you recall him testifying about a conference at Saint Mary's that he attended?
A Yes.
Q Is that familiar to you, that conference?
A Yes, I was at that conference.
Q Can you detail what happened at that conference as best you recall it?
A Well, I would say his general description was correct. What it was was one of the earliest meetings of people who were doing capital punishment litigation in Maryland to try to have some coherent approach to those cases and to be sure that people were doing things properly in those cases.
Only a few years beforehand they had set up the Capital Punishment Unit from the Maryland Public Defender and

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this conference was really generated by them so that people could learn substantitively and then practically what they ought to be doing.
There were a variety of panels that were

presented, some just dealing with the substantive law itself. You know, here are the decisions in Maryland, here are the decisions in the United States Supreme Court, the 4th Circuit, that pertain to capital punishment litigation. And then there was a great emphasis on how you go about developing these cases and defending your clients.
I would say the strongest emphasis at the conference as it has been virtually every conference I have gone to is the question of mitigation and the sentencing phase because I think really anybody who has been doing this type of work is under the realization that that is where if not you are inevitably, you are very likely to be at a sentencing phase and you need to go with thinking about sentencing from day one in these cases and how you are going to put the sentencing together. That was the strongest emphasis at that particular conference.
There was a lot of talk about mitigation and they brought in specialists, brought in attorneys from other places and that is what went on.
Q Okay. Now, at the conferences that you have attended I gather that the subject of what it takes to be an

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effective lawyer in a capital case was discussed?
A Sure, either directly or indirectly at virtually every conference. It is often times a separate subject matter that is covered and it is something that is underlying every single issue that they talk about because the approach is this is what you have to do in order to effectively represent your client.
Q Okay. Let's talk a little more about the Earleigh conference. You testified that that is an annual conference?

A Yes.
Q Who sponsors that?
A The Legal Defense Fund in New York is the primary sponsor. It has been co-sponsored at different times by different agencies that are involved in capital litigation defense, but primarily LDF out of New York.
What they do is they bring in from throughout the country and in fact even internationally, bring in some people from different European countries every year who participate at the conference, people who are doing capital litigation.
And they have about a three and a half day program of training and presentations and just opportunity to have dialogue with people in the area to talk about the developments in the law, what you need to do, the developments in areas of mitigation that aren't really local developments, but they are

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developments in learning about different things that need to be done and different problems that arise.
It is the most comprehensive conference in the country dealing with capital punishment.
Q How many lawyers attend it roughly?
A I'm sure it is at least two hundred. It may be more. The attendance is pretty high.
Q Where is the conference held?
A It is in Earleigh, Virginia, which is right beyond, a little bit beyond Manassas. I don't know if it is in Prince William County but maybe the next county over.
Q Is it within driving distance to Baltimore?
A Yes. In fact there are a number of people who come from Baltimore from the Public Defender's office, both from the Capital Litigation Unit and then there is the individual public defender offices attend every year.

Q So lawyers from the Maryland Public Defender office routinely attend this conference?
A Yes.
Q Mr. Fisher, are you generally familiar with the defense strategies and techniques in death penalty cases both with respect to guilt/innocence and sentencing?
A Yes, sir, I think so.
Q And I take it that your familiarity is based upon the experience you have described so far?

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A Based upon the experience and I think the one thing that probably has been as important as just my own cases is I spent a lot of time talking with people who do capital punishment litigation. I mentioned my partner earlier, who is probably even more involved in this area than I am; I mentioned Steven Bright and people at LDF that I'm regularly in contact with for a variety of reasons. But we talk about a lot of the cases and what you do and what you don't do.
Q In addition to the cases you have litigated, have you acted as a consultant for other lawyers on capital cases?
A Sure, on a number of cases.
MR. VERRILLI: At this time I would offer Mr. Fisher as an expert on the issues of ineffective assistance of counsel raised in this case.
THE COURT: Do you have any questions to ask him, Ms. Brobst?
MS. BROBST: Yes.
CROSS EXAMINATION (On Qualifications)
MS. BROBST:
Q How many cases have you actually tried at the guilt and sentencing phase, not the post conviction area, but

23 actually tried as first seat in a death penalty or capital
24 case?
25 A Well, all the trial cases that I have had have

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1 been co-counsel cases. That was with purpose. We went in
2 saying we thought it was important to have two attorneys and
3 that they have equal responsibilities.
4 All of the capital cases I have done have been
5 with experienced trial attorneys. There are three cases that
6 have been involved in at the trial level. None of them have
7 gone forward to verdict and then sentencing just because of
8 the way the cases resolved. One of them was actually as we
9 began the trial and as evidence broke we got a plea offer from
10 the State that subjected our client to about fifteen years
11 maximum in the penitentiary and we took that.
12 The other cases, as we began there were workouts
13 right on the eve of trial. So those cases didn't go all the
14 way through to verdict and then to sentencing because we just
15 never had to reach that point.
16 In terms of cases that I have done as far as
17 capital sentencing, I have had two cases -- three cases where
18 we have actually done sentencings off of capital cases either
19 because we picked them up after post conviction or we
20 litigated the post conviction and won and then came back and
21 did the resentencings. We didn't get relief on
22 guilt/innocence on those particular cases.
23 So as I said before, there are five cases really
24 where I think I have been counsel of record in a capital case
25 in Maryland and that is how they resolved. Two or three sort

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1 of worked out at trial and two back on resentencing.
2 I have also been involved just in a number of
3 other cases but not as counsel of record.
4 Q Okay. So you have never tried a death penalty
5 case in Maryland on guilt/innocence?
6 A Never gotten it all the way to verdict on
7 guilt/innocence.
8 Q And you never entered a sentencing proceeding
9 after a guilty verdict in a case in which you have handled?
10 A Not in which I have handled but in cases which
11 other people have handled.
12 Q On three occasions you have been counsel in this
13 co-counsel way in death penalty cases in Maryland at
14 sentencing proceedings?
15 A That's correct.
16 Q What three cases were they?
17 A We did the Mills case. I was also involved in
18 the Trimble case I think that was in front of Judge Fader that
19 Robert Morin had. At one point I was counsel of record.
20 Because the case worked out for other reasons, so we didn't
21 actually do the sentencing. Mr Trimble got resentenced after
22 getting relief on another issue.
23 THE COURT: In what I anticipated and was correct
24 in a distorted, forcing of words by 361 Rowe Boulevard. But
25 we knew that was going to happen. He was the only one on

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1 death row that was under 16.
2 THE WITNESS: There are actually two. The other
3 case I was about to talk about is the Johnson case which I had
4 that was out of this jurisdiction.

THE COURT: So I knew they were going to find a way since the law had changed because they had done that in Doering. So they found a way.
THE WITNESS: Then Mr. Johnson's case we also came back and then what happened is we were all prepared to go forward with the capital sentencing and Mr. Johnson's case, there was the change in the law and then he received relief on that and we did that --
THE COURT: That is pretty consistent because when there is a change in the law they give the benefit to the deathee, so as to speak. So they did the same thing in Doering and in Trimble.
THE WITNESS: That's correct. That case went off -- we resolved that up in Bel Air, up in Harford County in Mr. Johnson's case.
Q Well then I misunderstood you. I thought you said you have tried three sentencing hearings after post conviction or reversal on appeal or whatever?
A No. What I said is I was involved in three cases that were -- that came back for sentencing purposes in which we had to prepare sentencing hearings. It just so

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happened we were on the verge on two of those, Trimble and Johnson, of doing the hearings when we got relief from the, just from legal developments. In Mills we did a full sentencing hearing on Mills up in Cumberland County.
Q So you have tried one death penalty sentencing hearing in the State of Maryland?
A That's correct.
Q As trial counsel?
A Right.
Q Okay. And you have tried no death penalty cases

or sentencing hearings in Baltimore County?
A No, not -- if you count Trimble, it is a Baltimore County case, or if you count Johnson, which was a Baltimore County case that just got moved. But in terms of actually conducting the hearings here, no.
Q And you would agree as a person who considers himself an expert in this area that the way cases are handled also depends on the jurisdiction in which the case is being heard, wouldn't you agree, in certain respects?
A It is a factor. It is not a dispositive factor and I think it is less of a factor in a capital case than it is in other cases because of the particular aspects of capital cases.
Q But for example, the election of court/jury is a function of where you are trying the case, wouldn't you agree;

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you have to know the judge; you have to know what the jury composition is?
A I think that is true anywhere. I don't mean to say it is not something that has to be considered. The point I'm trying to make is what weight we might give that decision in a non-capital case is different than the weight I think you have to give that decision in a capital case because of the consequences and what individual jurors can do in a capital case that they cannot do in a non-capital case.
So it is just different weight. But it is a factor.
Q In addition to the one capital sentencing hearing you have been counsel on in Maryland, have you been counsel on an actual trial of a capital sentencing hearing in any other jurisdiction?
A One. That is a case that came back that I did

17 in the 11th Circuit. That is the Godfrey decision. That case
18 came back -- I don't mean to mislead you. That was a case we
19 came to the sentencing and again on the eve of sentencing we
20 worked out a resolution of the case. So the hearing itself
21 didn't go forward. But again, we were prepared to present the
22 hearing. So it was a workup without the presentation in
23 court.
24 Q So no?
25 A That's correct.

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1 MS. BROBST: I have nothing further on
2 qualifications and I will renew my objection.
3 THE COURT: Overruled. What you say certainly
4 has things to do with the weight because the gentleman has
5 never been into the bullpen. But at the same time, only the
6 weight. Not to the ability to express testimony.
7 MS. BROBST: Thank you, Your Honor.
8 DIRECT EXAMINATION (Continued.)
9 MR. VERRILLI:
10 Q Mr. Fisher, what did we ask you to do for Kevin
11 Wiggins in this case?
12 A First you gave me the transcript and portions of
13 the record in the case and asked me to review it and to render
14 an opinion as to whether I thought that counsel's performance
15 in the case was ineffective or effective.
16 Q Okay. In addition to reviewing the transcript
17 what else did you do to fulfill that task of rendering an
18 opinion on effectiveness of counsel?
19 A I went back and I reread all of the Maryland
20 ineffectiveness cases. I reread Strickland and a number of
21 cases that came from that. I talked with a number of
22 attorneys who had done capital litigation work and I also

23 spoke with some other attorneys who had -- some were not
24 currently, but who had prosecutorial background, to talk to
25 them about various aspects of this and whether or not they

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1 were of the same opinion that I was coming to. And that is
2 how I prepared.
3 I don't know if you recall this part of the
4 record, but I did read the trial judge's opinion.
5 THE COURT: You mean his opinion or that written
6 report that he is supposed to file?
7 THE WITNESS: His opinion on guilt/innocence,
8 Your Honor.
9 THE COURT: In other words from the transcript,
10 from what Judge Hinkel said from the bench?
11 THE WITNESS: Right.
12 THE COURT: All right, sir.
13 A Then of course in the last couple of days I have
14 been here and watched the testimony. In addition, I spoke to
15 you to try to find answers to some of the questions I had
16 about what had and had not gone on. I read the petition in
17 this case as well.
18 Q Did you hear all of the testimony of Carl
19 Schlaich yesterday?
20 A Yes, I did.
21 Q Did you hear all of the testimony of Michelle
22 Nethercott yesterday?
23 A Yes, I did.
24 Q I'm going to show you two documents which have
25 both been admitted into evidence. One is PC-2 and one is

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PC-4. Did you review these documents prior to the hearing today?
A Yes, I did. PC-4 is the jury composition report from Dr. Seltzer. PC-2 is the social history of Kevin Wiggins prepared by Hans Selvog.
Q Okay. Let's start with the issue of mitigation evidence. Mr. Fisher, are you familiar with the norms and standards expected of a reasonably competent defense counsel in preparation of a case in mitigation on the death penalty issue?
A Yes.
MS. BROBST: Objection.
THE COURT: Overruled.
Q Before explaining what the norms and standards are, can you summarize the basis of your knowledge of the norms and standards?
A Sure. It is very much what I was talking about earlier. I have had -- I guess really I have had five Maryland cases and I would say three or four other cases where I was actively involved in the representation of capital litigants. I have had a lot of other cases where although I wasn't counsel of record I was asked to consult on the case and have done so and have followed the cases through. They were not situations where I was just asked to talk about something for a brief period of time and then didn't know

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anything else about the case. It was ongoing consultation both in Maryland and in other states.
In addition, I have, as I have said, I have done research on capital punishment issues; I have attended

numerous seminars and participated in them; I have talked with mitigation specialists; I have done -- I know there are people who have done more, but I have done a lot of work in this area both substantitively and then just as a practical matter.
That is the basis of my opinion.
Q Okay. Generally in your opinion what are the minimum requirements for effective representation of a capital defendant at sentencing?
MS. BROBST: Objection.
THE COURT: Overruled.
A Uhm --
THE COURT: Let me ask you something. When you say you have an opinion and you based it upon all of these people you have talked to, is it accepted in your profession in expressing an opinion that you would rely on information of this sort?
THE WITNESS: Yes, it is, Your Honor.
THE COURT: All right. Go ahead.
Q Mr. Fisher, could you give us your opinion, your expert opinion on what the minimum requirements for effective representation in capital sentencing are?

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A I think you start at the beginning, which is you first have to go to the Statute and you have to look at whatever statute you are operating under, whether it is Maryland's or elsewhere, to see what the aggravators are and what the mitigators are that are statutorily prescribed. You start thinking about how you are going to try to either undercut the aggravators or to put on evidence in support of the statutory mitigating circumstances.
Then what you need to start doing is to do a complete comprehensive background on the client so that you

can not only address those issues but that you can also present additional evidence on what are commonly called non statutory mitigating evidence, things for example under the Maryland statute where the jury either individually or unanimously may be able to say we find the following information to the mitigating and would enter it into the weighing process.
That requires I think at a very minimum is you do a comprehensive psycho-social history of your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive workup of the client. That means not just talking to the client but talking to family members, talking -- going back through all of their social files, juvenile files, criminal records, whatever other files may exist, subpoenaing those records, collecting them.

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You try to get everything you possibly can about the client's background to start examining that and developing that for a competent presentation at a sentencing hearing should you ever be there.
Q Okay. In your expert opinion is the use of an expert in the development of such material ordinarily a minimum requirement for effective representation in a capital sentencing proceeding?
MS. BROBST: Objection.
THE COURT: Overruled.
A Yes.
Q Can you explain why that is?
A It is kind of part and parcel of what I was saying earlier. In the normal criminal case if you are trying to put on sentencing information on behalf of your client. I think that criminal attorneys individually and maybe

institutions like a public defender, something like that, have a general approach to sentencing and they may go out and gather particular types of information. So maybe you do some investigation or something like that or you talk with your client, talk with the family and fine, you are able to develop a certain level of information.
In capital cases you have to go further than that and you have to be trained to do it. Most of the people that you encounter when you get into these very difficult issues

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such as abuse, neglect, sexual abuse, other sort of things, the client, the family, other individuals are very resistant to providing information, particularly at the outset. That needs to be developed. You have to have somebody who knows how to delve into that information, how to bring it out, how to look at records and so forth and understand what that means.
I as an attorney can look at a social file on a client. What I mean by social file is a file that might be created when he is a juvenile. I may see certain things. A person who has expertise in this area will look at it and see it at many different layers than I will. They will know how this information came about and they will know that there is more out there.
For me it will be a conclusion. For them it will be a clue. They will take that and go further. That is why you need to have these people who do that and that is what they do and they do it extremely well.
Q Mr. Fisher, have you -- let me withdrawal that.
Based on the knowledge that you bring to your testimony today, your review of the trial record and the testimony that you have heard thus far in these proceedings, have you formed an

opinion as to whether trial counsel for Mr. Wiggins met the minimum requirements of effective representation in a sentencing proceeding?

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A Yes, I have.
Q What is your opinion?
MS. BROBST: Objection.
THE COURT: Overruled.
A My opinion is that they did not both as an overall matter and in some very specific ways as well, that they did not meet the minimum standards of the profession.
Q Okay. I would like to elaborate on that. Tell us what you mean by that?
A I think overall it speaks for itself. I think had they done a variety of things that contributed to the result here, then they would not have been ineffective. In particular, the things that come to mind is first of all the whole question of their investigation, presentation of mitigation evidence. They simply did not do what is necessary in order to have presented that properly to the Court, to the jury on behalf of their client. I don't believe that -- we can talk about this in a moment, but this whole question about compelling the client, if that is indeed what happened, to choose a judge over a jury, I don't think is effective assistance of counsel. If it is a reasoned decision, that is a different matter. If it was something that was forced because of their inability to prepare and to get their own experts in line or to seek alternative means such as a continuance and so forth, then I

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believe it to be ineffective assistance. I believe that on the question of the impeachment of Dr. Korrell, which both counsel clearly believed she was a witness going through what they thought was the most important issue in this case, I think that their inability or their unwillingness to confront her with contradictory statements which were crucial contradictory statements is ineffective without justification. There doesn't seem to be a justification for their failure to do that. I don't think it shows any look at what the legal standards were by which they were to be guided on that question.
Q Let's go through each of those in detail. Let's focus on developing the case in mitigation. You stated that you thought that they did not meet the minimum requirements in developing that case. What did they fail to do that they should have done to meet the minimum requirements?
A I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into these various problems that he had. And then they didn't present -- I have read this report by Dr. Selvog. I must say that in terms of Mr. Wiggins's background, that the deprivations and neglect he suffered are -- they may not be the strongest I have ever seen, but it is among the strongest I have ever seen. I have seen dozens of background that have

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been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.
It certainly does not impress me as being any kind

of sound strategic decision to get there. There doesn't seem to be an excuse for them either not having gone out and put it together, because it was -- much of it was there for the taking. And then not presenting it just makes it, it just makes no sense to me, frankly.
Q Just so we are clear, is it your opinion that trial counsel failed to meet the minimum requirements of competent representation because they did not retain an expert to prepare what you have described as a psycho-social history?
A Yes, either to prepare an expert -- there are some public defender offices, I'm not saying that this one particularly has it, but other public defender offices may have somebody on staff who can do this properly. If you don't have that, you have to go out and get somebody who does it. They did not do it.
I'm not saying that in every single case you necessarily have to have a psychiatric social worker to do it if you have another means of doing it properly, but they clearly did not. They didn't do it and in this case their failure to do it is ineffective.
Q Is your opinion influenced by the fact that

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funds were available to hire an expert to do that?
A Certainly.
Q Is your opinion influenced by the fact that the Maryland Public Defender's office routinely hires experts to do these psycho-social histories?
A Yes.
Q Okay.
A Let me just say, it is also -- what is also particularly disturbing is in 1985, '86, '87 as the capital unit was developing, and as these conferences were being held,

this was something that was stressed at those conferences. This is what they were telling public defenders to do, that they needed to do the psycho-social history and to work it up. So it was a normative standard at the time that this case came in. Indeed, years beforehand. And again, it just -- I don't understand why that didn't happen.
Q Okay. And I take it that the kind of information you just described was imparted to the participants at the Saint Mary's conference?
A Absolutely.
Q Mr. Schlaich testified I believe that a forensic social worker did give a presentation at that conference which he attended. Was the presentation about the development of this sort of evidence?
A Yes.

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Q Now, do you have an opinion as to the likely impact of the failure to develop and present this evidence, principally the evidence contained in PC-2, the Selvog report?
MS. BROBST: Objection.
THE COURT: Well, he is just asking you yes or no.
THE WITNESS: The answer to that question is yes.
Q What is the basis for your opinion?
A Again, really -- well, I should say it is the same things that we talked about earlier in terms of experience. But what is particularly a part of that opinion is my own experience in the case that I did do where we went to a capital sentencing resentencing and some specific cases of which I'm aware either that I have worked on as a consultant or I spoke with the attorneys about.
When I talk about my own experience I'm talking

about the Mills case where in that case our client was someone who had a terrible prior criminal record of convictions for violent crimes; he had been serving a lengthy sentence for a murder when he committed a second murder while in a penal institution; he had some deprivations and some problems in his background but nothing nearly so severe as Mr. Wiggins.
And in that case when we went to sentencing verdict in front of the jury in Cumberland County they unanimously found for life. They unanimously found statutory

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and non-statutory mitigating circumstances of, again, of the nature that should have been presented in Mr. Wiggins's case but clearly could not have been presented so compellingly and they also found partially other mitigating circumstances.
Again, they found unanimously for life in a case which had once received a death sentence where that evidence had not been presented.
There is also other cases that I'm familiar with either, again, through consulting or being sort of working on in part with my partner, Mr. Morin. He recently had a case that was tried up in Harford County I think that was out of Baltimore County where there was a life sentence that was returned by a judge in that particular case. There are cases in Montgomery County, the Calhoun case comes to mind, again, where the background was -- the bad background was so much more severe than Mr. Wiggins had, the mitigating background was not nearly so strong and the jury is returning life sentences. There are also cases in Prince George's and other counties that I'm aware of.
So when I reach a decision about prejudice, that has impact on that decision.
Q Now, Mr. Fisher, based on all of the knowledge

that you bring to this case and experience and your review of the materials and testimony you have heard, testimony you just gave, what is your opinion as to the likely impact of the

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failure to develop and present this evidence?
MS. BROBST: Objection.
THE COURT: I will sustain that objection.
MR. VERRILLI: May I be heard on that?
THE COURT: Sure.
MR. VERRILLI: Yesterday counsel for the State specifically asked Carl Schlaich to compare his experience in this case with respect to the development and presentation of mitigating evidence.
THE COURT: Why didn't you object to that?
MR. VERRILLI: Excuse me?
THE COURT: Why didn't you object to that?
MR. VERRILLI: Because I thought it was reasonable grounds for her to go into and reasonable ground to develop it.
THE COURT: I don't agree with that. If you would have objected to it I would have sustained the objection.
MR. VERRILLI: Your Honor, we have to be able to present evidence here on the basis of experts' comparison of the facts and circumstances of this case as compared to the facts and circumstances of others.
THE COURT: Based upon what he has told me I'm not convinced that it is sufficient basis of comparison.
MR. VERRILLI: Your Honor, I would have to note

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for the record that if we are not allowed to develop this evidence of prejudice --
THE COURT: I'm not going to allow you to develop it. You can proffer for appellate court purposes whatever you want to but I will not consider this as evidence in the record.
MR. VERRILLI: Let me note for the record an objection on the ground that we think the failure to allow the introduction of this evidence will deprive us of the ability to have a full and fair hearing on this question --
THE COURT: Fine.
MR. VERRILLI: -- to the extent it is a factual question, which we believe it is.
THE COURT: I can only say in my experience of sixteen years on the bench if this fellow was allowed to express the opinion on the meager little evidence that he has presented to us as far as comparison is concerned, then anyone should be able to express an opinion on almost anything. With that, I'm in the business of reading juries and judges and knowing. He certainly does not have an adequate basis to express that opinion. I will allow you to proffer it for appellate court purposes but will not consider it as evidence in the case. Objection overruled.
MR. VERRILLI: In terms of proffer, Your Honor, I would prefer that we have Mr. Fisher say what he would say.

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THE COURT: I will consider what he is going to say, now, sir, as a proffer and for the benefit of 361 Rowe Boulevard but not having to do with evidence in the case.
Q Very well. Mr. Fisher --

THE COURT: Let me say this to you. I know that death is different. That is preached to us. That is said to us. But it isn't that different that he should be able to express this opinion in my humble opinion.
All right. Tell me what he will say.
Q Mr. Fisher, what is your opinion as to the likely impact of the failure to develop and present such evidence?
A I think that there is and, in using the standards of Strickland, more than a substantial probability that this failure to present evidence effected the outcome of the sentencing hearing in this case.
Q And why is that?
A Because -- what I have said just a moment ago I think in many ways is the primary thing. That is I have seen this, what happens when you present mitigating evidence of this nature, particularly when there is not an overwhelming number of aggravators or aggravating evidence that is presented by the State.
In addition, if you look at the -- the jury received some spares background on Mr. Wiggins and there was

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no argument about it; there was no presentation through individual witnesses. And yet from that alone, at least some of them on the verdict form indicated a willingness to find a mitigating circumstance.
Q Was that a mitigating circumstance of background?
A That's right. And without any request to further define that or break that out or to make individual aspects of his background individually mitigating, which when I talked about the Mills case before, that is what was done

11 and the jury both in terms of how we questioned them at the
12 beginning and when we talked to them afterwards talked to us
13 about why it is so important to present them with mitigating
14 evidence of that nature about a person's background.
15 Again, I have done a lot of reading on this
16 particular issue about what juries are concerned about as far
17 as mitigating evidence. The things that are in Kevin
18 Wiggins's background, the neglect, the abuse, really basically
19 the abandonment as a child and then when he finally gets into
20 some stabilized situation exacerbation through abuse is
21 extremely strong mitigating evidence.
22 In my opinion had that been presented, that the
23 outcome of this sentencing would have been different.
24 MR. VERRILLI: Thank you. That concludes our
25 proffer. I propose now to return to the presentation of

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1 evidence.
2 THE COURT: All right. Proffer is over. We will
3 take a break for lunch. Come back at 1:30 and we will listen
4 to you then.
5 Sir, remember that when you are in the middle of
6 your testimony you are not able to talk to anyone about your
7 testimony and that includes the attorneys in the case.
8 THE WITNESS: Certainly, Your Honor.
9 (WHEREUPON, the court recessed and reconvened.)
10 THE COURT: Come back to the stand, Mr. Fisher.
11 What are we going to do about arguing the case?
12 MR. VERRILLI : We would favor prompt argument.
13 THE COURT: How about next week?
14 MR. VERRILLI: That would be fine. We are
15 informed that a transcript can be ready by the end of this
16 week, as long as we have a couple of days to read it, digest

17 it and pull out the evidence.
18 THE COURT: Yeah. Find out what days next week
19 would be okay for Justice Grimm. Have you got any trials?
20 MS. BROBST: I would have to call my office. I
21 don't carry a pocket calendar. I can handle that during a
22 recess.
23 MR. VERRILLI: Your Honor, my only unavailability
24 next week is Tuesday.
25 THE COURT: Tell her Tuesday is bad.

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1 You had some more questions to ask the gentleman?
2 MR. VERRILLI: Yes, I do, Your Honor.
3 DIRECT EXAMINATION (Continued.)
4 MR. VERRILLI :
5 Q Before lunch we were discussing the issue of
6 preparing the case in mitigation in a death penalty case.
7 Let's just recap the opinions you rendered before lunch so we
8 have them clear. Now, as I understand it is your opinion that
9 the failure of defense counsel in this case to develop and
10 prepare a psycho-social history on the order of exhibit PC-2,
11 the Selvog report, fell below the minimum requirements for
12 effective representation in a capital case, is that right?
13 MS. BROBST: Objection.
14 THE COURT: Overruled.
15 A Yes.
16 Q That is a fair recap of your testimony?
17 A Yes.
18 Q Now, is one reason for that opinion that
19 attorneys in capital cases need to know how strong their case
20 in mitigation is before deciding how to handle the sentencing
21 proceeding?
22 MS. BROBST: Objection. Leading.

23 THE COURT: Well, that is what he said.
24 Overruled. That is a compilation.
25 A Yes. That is true.

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1 Q Now, does that need to know how strong a case in
2 mitigation is vary from jurisdiction to jurisdiction?
3 A No.
4 Q So is it fair to say that is a uniform
5 requirement for any defense counsel in any capital case in any
6 jurisdiction in this country?
7 MS. BROBST: Objection.
8 THE COURT: Overruled.
9 A Yes, that is my opinion.
10 Q In terms of the presentation of a psycho-social
11 history at a sentencing proceeding is it critical whether the
12 expert social worker is competent to deliver a medical
13 diagnosis?
14 A It doesn't necessarily have to deliver a medical
15 diagnosis. It represents that the person have some knowledge
16 of medical matters because, again, as you begin to develop
17 this information things will come up in the background,
18 whether they be through discussion with the witnesses or the
19 client or a review of the files that will be in some sort of
20 medical terminology or bring forth medical questions. And
21 they need to know how to follow-up on that. So that knowledge
22 is important.
23 Q Medical knowledge is important?
24 A Right. But they don't need to be a physician,
25 you don't have to be a psychiatrist in order to be a

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1 psychiatric social worker. But you have to have some
2 specialization in the development of this information.
3 Q Right. Now, in terms of the presentation of the
4 information at sentencing, is the information of the kind
5 contained in PC-2, the Selvog report, relevant mitigating
6 evidence based on your understanding of everything under the
7 law, whether or not it comes in the form of a medical
8 diagnosis?
9 A Absolutely.
10 MS. BROBST: Objection.
11 THE COURT: I'm going to overrule the objection
12 because I don't believe that anybody would testify in the
13 world that had any familiarity with this case as to anything
14 other than what this man is testifying to. It is not even
15 expert opinion. It is God given fact. Go ahead.
16 A I guess my answer is yes for the record.
17 Q Okay. I'd like now to stay with the mitigation
18 question and change the focus a little bit and talk with you
19 about trial counsel's, Mr. Schlaich's, decision to retry the
20 guilt/innocence issues at the sentencing phase of the
21 proceeding.
22 Do you have an opinion as to whether or not that
23 course of conduct by Mr. Schlaich fell below the minimum
24 requirements of capital counsel in a sentencing proceeding?
25 A Yes.

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1 THE COURT: What part of his -- what did he do?
2 What fell below?
3 MR. VERRILLI: The decision to retry guilt and
4 innocence at the sentencing phase of the proceeding.

5 THE COURT: Okay.
6 MR. VERRILLI: To the exclusion of all other
7 avenues of mitigation.
8 THE COURT: All right.
9 A What I was going to answer is yes and
10 particularly because of the --
11 MS. BROBST: Objection.
12 THE COURT: Okay.
13 MS. BROBST: He was asked a yes or no question.
14 THE COURT: Remember now, the question is his
15 decision to try the guilt/innocence, the reasonable doubt
16 aspect of it twice to the exclusion; do you understand that?
17 There is nothing wrong with his decision in your opinion, is
18 it, with trying to put the guilty conscience on the trial
19 judge or the jury; hey, there is doubt about this; even though
20 you convicted him, don't kill him?
21 THE WITNESS: No.
22 MR. VERRILLI: Is that directed at the witness?
23 THE WITNESS: Your Honor, I don't think there is
24 any problem with the decision to retry guilt/innocence as part
25 of an overall mitigation case.

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1 THE COURT: That is part of the game. You have
2 made your decision guilt/innocence but if there is a thousand
3 in one chance, then don't kill him?
4 THE WITNESS: Right.
5 THE COURT: That is part of the game.
6 THE WITNESS: Certainly.
7 THE COURT: You are saying to the exclusion of
8 everything else?
9 THE WITNESS: That's correct.
10 Q Okay. Why do you hold that opinion?

11 A In sort of summary fashion, again, I think it
12 has to do both with my experience, the experience of other
13 attorneys, and just simply looking at this, there was and
14 there is strong mitigating evidence on behalf of Kevin Wiggins
15 that has been developed by Dr. Selvog concerning his
16 background and things that have to do with him.
17 There is no inconsistency in being able to try the
18 guilt/innocence, reasonable doubt or lingering doubt or
19 however he might have wanted to phrase it to the jury while at
20 the same time presenting this evidence. And in addition, as I
21 said before, this is not weak mitigating evidence on behalf of
22 Kevin Wiggins. It is very strong mitigating evidence. And to
23 decide to forego that entirely or in any coherent competent
24 form simply to pursue the reasonable doubt question
25 particularly when -- I mean, this is the only case I know of

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1 where the sequence was there was a Judge trial and you tried
2 guilt/innocence and then you are asking a jury to override a
3 judge's decision in essence about the quality of the evidence.
4 I know of other cases where you are either tried
5 guilt/innocence to a jury and then you tried the question of
6 the quantum of the evidence again to them at sentencing in
7 addition to presenting other mitigation evidence. But I don't
8 know of any cases where you tried to get them to override the
9 judge's decision and then presented them nothing else.
10 Q Is that in your opinion -- let me ask it this
11 way. Can you elaborate on the significance of the testimony
12 you just gave why it is significant that there was a change
13 from the judge with respect to guilt and innocence and then
14 the jury with respect to sentence?
15 A What you normally are hoping to do when you
16 present lingering doubt or reasonable doubt at the sentencing

17 is when you have what you consider to be a weak factual case
18 and yet guilt has been returned, you particularly when that
19 has been after a long deliberative process by the jury, where
20 they didn't return a quick verdict, where they took some time
21 and there seemed to be some agonizing in the jury room, what
22 you are intending to do is reach those one or two or maybe
23 more jurors who had some very grave concerns about the
24 client's guilt and to make that be a mitigating factor. And
25 so you are going for the same people who you had been dealing

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1 with on guilt or innocence.
2 But when you have a judge who you tried the
3 guilt/innocence to a judge and the judge has found the
4 evidence, and that has some -- a judge's decision has some
5 power, it has some sway over a jury, and then asking a jury to
6 override that in essence and find that the judge's
7 determination was in error, I just think that that is flawed
8 -- that sort of thinking is flawed from the outset.
9 If it is the only thing you have got, fine, you
10 may have to do that. But that wasn't the only thing that
11 existed here. There was so much more to present on Kevin
12 Wiggins's behalf in mitigation that wasn't developed and
13 wasn't presented and I think that that -- it just doesn't rise
14 to the level of sound decision making by competent counsel.
15 Q What about the hypothetical risk that was
16 discussed yesterday of opening the door to potentially
17 unfavorable information?
18 A You mean with regard to the mitigation?
19 Q Right.
20 A First of all you have to develop it and you have
21 to work on how you are going to present it to even make that
22 determination. You can't -- saying that you are not going to

23 present psycho-social background information because there is
24 a risk that it can be dealt with effectively in
25 cross-examination is somewhat akin to saying on a

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1 guilt/innocence trial I never present self defense claims; I
2 never present alibi claims; I never do those sort of defenses
3 because there is problems with them.
4 Every defense has problems but you have to go out
5 and investigate it, develop it, decide on the presentation and
6 then weigh what is going to go on with that presentation in
7 determining whether to use it or not to use it. So as a kind
8 of preliminary step that wasn't done.
9 Then in addition, again, I just go back to the
10 quality of this evidence. It is extremely compelling
11 mitigating evidence. I think even had he done the background
12 as he should have, when he looked at this evidence it is not a
13 sound decision not to present it. And, indeed, a glimmer of
14 it got to the jury in some form, either the presentence report
15 or something that they picked up because it was in there a
16 little bit but not developed in any way.
17 So the notion that there was a tactic in not
18 presenting it makes no sense because it was at least there in
19 the evidence a little bit but not presented in any coherent
20 fashion.
21 Q And I take it that you heard Mr. Schlaich
22 testify yesterday that whatever mitigating evidence he had
23 developed he gave to the person preparing the presentence
24 report; do you recall that?
25 A Right.

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Q What significance does that have in your overall assessment of the reasonableness of his conduct?
A Again, if -- the presentence -- I read the presentence report in this case and there is two paragraphs about Kevin Wiggins's background that just touch upon the problems that he had and nothing more. There is no independent investigation, any kind of workup.
If the tactical decision by Mr. Schlaich was not to present this evidence, obviously that is contrary to it because he got it to the presentence report writer in some fashion. But if he had it, at least he had the beginnings of it and he had no resources impediment to doing a further investigation, then he could have and should have gone out and developed it.
This notion that there was a downside, it just doesn't make a lot of sense because he ultimately presents it in some way, at least in very, very limited way. He should have presented it more fully. He should have developed it.
Q So just to recap now, is it your testimony that Mr. Schlaich's decision just makes no sense given that he in some perfunctory way sought to get that mitigation evidence to the jury?
A Yes. There is one other part of it that was just troubling to me because I don't quite understand from the record. When you look in the record at the time that the

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verdict was returned by the judge, the guilt/innocence determination, there was a request for additional time to develop mitigating evidence at sentencing and a specific request. They said we are not prepared, we need to go out and

develop mitigation, we need to go out and develop some statistical information. There is some reference to it by him. Something was envisioned at that time or some notion of presentation and at least from what I see there doesn't appear to be anything done about mitigation during that time period. Again, it was thought about at some level but not followed up at any level.
Q Okay. Have you got a copy of the Maryland capital punishment statute in front of you?
A Yes.
Q I'd like to ask you a couple of questions about it. We are talking now about Section 4-13, subsection G?
A Okay.
Q These are the mitigating circumstances enumerated in the statute. Is it your opinion that it is part of trial counsel's job to review these statutory mitigating factors?
A Yes.
Q And is it your opinion that it is part of trial counsel's job to develop available mitigating evidence as indicated by the mitigating factors in the statute?

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A Yes.
Q Can you take a minute and review the mitigating factors in subsection G and identify for me the potential mitigating factors listed in the statute that you believe are relevant here and that Dr. Selvog's report would have been relevant to?
MS. BROBST: Objection.
THE COURT: Overruled.
A Certainly. First of all, in this -- and this may be somewhat independent of the question, but the very

first mitigating factor, the absence of a prior history of criminal record of violence, in what I understand about Mr. Wiggins's background, what existed, I know there is some reference to it in the trial and sentencing proceedings; it is not entirely clear to me whether that was part of the verdict form, although I think it was. It is not clear. That certainly is one that pertained in this case.
But with regard more particularly to Dr. Selvog's report, if you go to Number 4, which is the murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance, his report clearly goes to that. There are a number of things in there that independently and collectively

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I think go to that issue and certainly might have persuaded a jury to unanimously or less than unanimously --
MS. BROBST: Objection as to what it would have persuaded a jury to do.
THE COURT: He is just commenting on factors and to say may means nothing. Overruled.
A That may have had a jury return it on that particular one. The question number 7, which is it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society, again, I think the information in Dr. Selvog's report goes to that issue.
And then, as we talked about earlier, really, number 8, which is any other facts which the jury or the Court specifically sets forth in writing that it finds as mitigating circumstances in this case, and you could either have there

might either be a generic term such as background of Kevin Wiggins or something like that. Or more specifically you could break that down into any specific mitigating factors, that he was abandoned or neglected as a child, that he was sexually abused, that there was other abuse in his background, his mental health and his IQ, all of those things could be for a jury independent, non-statutory mitigating factors under item 8 here.
Q Mr. Fisher, I am prepared now to move to another

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topic. Before I do I want to ask you whether there is anything that you feel you have left out in terms of the opinion that you have rendered with respect to the mitigation phase of the case that you would like to add at this time?
A Not that I can think of.
Q Okay. Let's turn now to the jury composition challenge question.
A All right.
Q Do you have an opinion, Mr. Fisher --
THE COURT: Wait a minute. Is this the racial aspect of it?
MR. VERRILLI: Yes, Your Honor.
THE COURT: All right.

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CROSS EXAMINATION [WITNESS: GERALD FISHER]
MS. BROBST:
Q Thank you, Your Honor. On how many occasions have you been asked by post conviction counsel to review a death penalty case and testify as an expert witness?

17 A I have been asked to testify as an expert
18 probably about a dozen times. In all of those save this one I
19 have for various reasons not done so. Sometimes it has just
20 been scheduling concerns. Other times it has been other more
21 personal concerns. So I haven't done that.
22 If I can sort of break your question down. I have
23 reviewed a number of cases, records or at least petitions in
24 the beginnings of records either for that purpose or for other
25 purposes, and that is probably, I don't know, maybe more than

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1 a dozen times that I have looked at petitions and records and
2 we have talked about ineffectiveness questions but never been
3 directly asked do you want to be or would you be available to
4 be an expert in capital case for ineffectiveness purposes.
5 Q So this is the first time?
6 A This is the first in a capital case, yes.
7 Q And how many post conviction petitions have you
8 filed in capital cases?
9 A In capital cases?
10 Q Yes.
11 A Probably -- I don't have an exact number. It is
12 in the nature of seven or eight post conviction cases that I
13 have worked on.
14 Q Have you ever filed a petition for post
15 conviction relief and failed to allege incompetency of
16 counsel?
17 A Yes.
18 Q What case was that?
19 A It was a case in Georgia. I think it is the
20 Cape case, State versus Cape.
21 THE COURT: I bet you there is some judges down
22 there that have more than four death penalty cases they have

23 tried.
24 THE WITNESS: Clearly. There was actually very
25 good trial counsel in the case but there were a number of very

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1 substantial issues that at one level won relief and ultimately
2 that was overturned by the 11th Circuit I believe.
3 Q So in six out of seven petitions for post
4 conviction you have filed you have alleged incompetency of
5 counsel?
6 A Yes.
7 Q And alleged that it was first incompetent and
8 second that it prejudiced the outcome, is that correct?
9 A Some of these were pre Strickland cases, so I
10 don't know if we made the claim in quite the same -- at the
11 time in 1983 and 1984 and before Strickland in '85 there were
12 different standards of incompetent counsel depending on where
13 you were litigating. The circuits were divided, the states
14 were divided on the standards.
15 That is essentially what the standard did, is it
16 coalesced it into one standard. For all practical purposes
17 that is what was being done. You are alleging that counsel
18 was functioning incompetently and that there was prejudice,
19 but the prong was much different back then.
20 Q All right. When were you contacted to act as an
21 expert in this case?
22 A I can't remember the exact date. It probably
23 has been about, I don't know, maybe ninety days ago, about
24 thereabouts, two, three months ago.
25 Q When were you able to conclude as a fact that

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counsel had been in fact incompetent?
A Once I had gotten the record, talked to some people about the allegations that were being made -- I can't give you an exact date but probably -- it took me awhile to get through the transcripts and everything. So probably about thirty to forty-five days ago, maybe a little bit longer than that.
Q You repeatedly refer to the basis of your opinion stating in addition to the materials that you reviewed and this vast knowledge that you have in this area, that you also consulted with other attorneys who you considered to be versed in capital litigation?
A Yes.
Q Can you estimate for us to what extent the opinions you stated today are yours as opposed to theirs?
A My opinions are hundred percent my opinions. They are based in part on other people's independent view of the questions, I mean, in the sense that we talked about them, and I tried to see if there were things that their conclusions were different than mine. If someone on a particular issue had said no, I think there is a legitimate reason for doing something, that this makes sense, it might have swayed my opinion otherwise. Quite frankly, I didn't get that response from the people I talked to.
I think my opinions are almost one hundred percent

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the same opinion shared by the other people.
Q So your opinions are bolstered by all these other unnamed people?
A You can use that word. They are certainly

seconded and thirded by them.
Q You repeatedly referred to the writer of the background information in the Wiggins background history as Dr. Selvog. Isn't it true that in fact he is Mr. Selvog and is a licensed clinical social worker?
A I thought he had a PhD and that is the reason I referred to him as Dr. Selvog. If I'm wrong about the PhD label, then I'm wrong. I didn't mean to suggest that he was a medical doctor. I thought he had a doctorate. I may be wrong about that.
Q Now, how many people are on death row in the State of Maryland?
A What is the number now? I don't know the exact number. I think it is in the 20s.
Q How many of them introduced mitigating circumstance about his background at his sentencing hearing?
A I don't know what the number is on everyone -- the majority have done so. A number of them did not do so. I can't say I have broken it down numerically. There are a number who are on death row who did not present mitigating evidence and there are a number on death row who did present

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mitigating evidence. The vast majority are in the latter category.
Q In other words, most of them did present this kind of background information on mitigating circumstances?
A Do you mean the fully developed psycho-social history?
Q That is what I mean.
A I'm not sure I would say the majority had done that. I think --
MR. VERRILLI: Your Honor, could I be heard for a

11 moment?
12 THE COURT: Yes.
13 MR. VERRILLI: Seems to me Ms. Brobst is asking
14 questions in precisely the area that Your Honor forbade me
15 from going into, comparison of what happened in one case with
16 psycho-social histories as opposed to what happens in other
17 cases that didn't have them.
18 THE COURT: I would not accept that if that is
19 the reason she is doing it. Frankly, I thought that it was
20 another reason. I thought that she is asking these questions
21 to show that he has not done his homework as extensively as he
22 says he has because he really hasn't gone to the one source
23 that people would go to first, namely the people that are on
24 death row.

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[THE COURT]
14 The question is there are twenty people on death
15 row. Did any of their lawyers do it? She has a right to ask
16 that question.
17 MR. VERRILLI: I don't dispute that. I want to
18 make clear that I think I'm going to have a right then to
19 explore the same question of comparison.
20 THE COURT: Maybe as comparison as to whether they
21 did it. But as to what they did, it is an entirely different
22 thing, sir.
23 Let's listen to the questions.
24 Q I know that you were present during the
25 testimony of Mr. Schlaich and Miss Nethercott, so these

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1 questions are along the same lines that I asked them. You are

2 aware of strategic problems with introducing a defendant's
3 background through clinical types, are you not?
4 A Strategic problems can arise. I can't say that
5 in every case they do arise. There are concerns in every case
6 about what is going to happen in terms of other evidence
7 presented by the State or cross-examination by the State.
8 Q Okay. Specifically regarding, for want of a
9 better term, bad things the defendant has done earlier in his
10 life that would not otherwise be admissible specifically in
11 the merits in this case or on sentencing, is that correct?
12 A Yes.
13 Q You run the risk of opening the door on a lot of
14 stuff, is that right?
15 A You run the risk of opening the door to whatever
16 exists for the particular defendant.
17 Q Okay. And you are aware, I'm sure, of problems
18 of credibility that a defense attorney could face when
19 addressing a jury with what I will call conflicting defenses
20 and I will give you an example; he didn't do it but if he did,
21 it is because he had a lousy background?
22 A That problem in general exists. What I stated
23 earlier though I think is true. First of all, I don't think
24 there is a conflict in the situation of putting up reasonable
25 or lingering doubt and putting up mitigating evidence about an

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1 individual. I don't think that creates a conflict.
2 Certainly in all the cases I know about where the
3 lingering doubt or reasonable doubt issue has been raised, it
4 has been raised in tandem with other mitigating evidence. And
5 jurors in post decision interviews do not seem to be disturbed
6 about that presentation. And in a number of cases of which
7 I'm aware there has been verdicts and findings -- verdicts for

life and findings of mitigating evidence either accepting or rejecting the lingering doubt question.
So I just don't see it as a conflict here.
Q As you know, the defendant -- the State stipulated to the mitigating circumstance Number 1 in this case?
A Yes.
Q The defendant had no prior criminal record?
A Yes.
Q What age was he when this crime occurred?
A He was in his late 20's, I think.
Q Don't you agree that there is a substantial probability that background information such as that contained in the Selvog report would have given the jury an answer to the reason why someone might have done a thing like this, which they wouldn't have had otherwise?
A I really don't see it as that. It is not the type of crime -- if this had been a crime where there was some

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earlier conduct of his or some earlier problems of his that seemed to have been very directly connected to the conduct here, and I'm not trying to undermine -- this was a murder and I know it was of an elderly victim, but there was not -- there wasn't like wild, crazy bludgeoning; there wasn't wild sexual conduct or anything like that. These things weren't established by the evidence in this case. So I don't see the connection here.
There are cases I think where that is a dilemma, that you worry it would give some sort of explanation. I still believe you need to be able to present mitigating evidence. How you present it may be somewhat different. But I don't think it existed here.

Q How was Mrs. Lacs killed?
A Well, apparently by drowning in -- a combination of drowning and strangulation and she had a heart attack at the time. So it does seem that there was some combination of factors going on at the same time.
Q And her underpants were removed?
A She was not wearing underpants.
Q Her skirt was pulled up around her waist?
A Yes.
Q And Black Flag and Top Job had been dumped on her.
MR. VERRILLI: Was that a question?

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Q Isn't that correct?
A From the evidence in this case, yes.
Q And don't you think a jury would want an explanation for how could somebody do a thing like this?
A They might want an explanation. I don't doubt that.
Q And if the State was stuck with merely a 26 year old individual with no prior criminal record, they wouldn't have that explanation, would they?
A Conceivably they wouldn't have that explanation. I don't think by the presentation of the mitigating evidence they would have had that explanation.
MS. BROBST: Okay. Would you mark these, please?
(WHEREUPON, the above referred to documents were marked for Identification as State's Exhibit Numbers 2 and 3.)
Q How do you know that the trial attorneys did no background information or checking on behalf of the defendant Mr. Wiggins?

20 A I don't think I said that they did none. I
21 think what I have said is that they haven't done a
22 psycho-social history with him. They haven't done an
23 extensive background check at least from what I have seen of
24 the record in this case.
25 Q Okay. And you had an opportunity to review the

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1 record in this case, is that correct?
2 A Yes.
3 Q I'd like to show you what has been marked as
4 State's Exhibit Number 2 and 3. This has been marked as
5 State's Exhibit Number 2 for post conviction hearing. I ask
6 you if you have had an opportunity to review that document
7 before?
8 A Um-hum.
9 Q Okay. What does that document indicate?
10 A It is a defendant's supplemental answer to the
11 State's discovery request. It indicates that the defense had
12 intended to call a William -- I don't know how you pronounce
13 it. S T E J S K A L. An expert in psychology. And went to
14 the question of whether he suffered from a mental disorder,
15 and then also some testing that the doctor had done.
16 Q It described some testing that the doctor had
17 done?
18 A That's correct.
19 MS. BROBST: I move this in evidence as State's
20 2.
21 MR. VERRILLI: I assume this is part of the
22 record already. I Have no objection.
23.THE COURT: Let me see it, please. Overruled.
24 Put it in.
25 (WHEREUPON, the above referred to document was

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1 entered in evidence as State's Exhibit
2 Number 2.).
3 Q I will now show you that which has been marked
4 for the purposes of the post conviction hearing only as
5 State's Exhibit Number 3. I ask you whether you have had an
6 opportunity to review this document?
7 A Yes.
8 Q What is that?
9 A This is a defense motion to produce tangible
10 evidence before trial which in part seeks to, if I can read it
11 for one moment -- I think what it does is it is asking to be
12 able to look at certain records that pertain to his background
13 in order to prepare for court proceedings, for trial
14 proceedings and sentencing.
15 Q Okay. And do you know whether an order was
16 signed pursuant to that motion?
17 A I believe it was.
18 Q Do you know whether or not those documents and
19 materials were released to defense counsel?
20 A I don't know if all of the documents requested
21 here were. I know that there are records in the -- there are
22 documents in the record about his social history and his
23 social background.
24 Q In what record, in the record of the Court file
25 or the record of the Public Defender's office?

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1 A Things I have reviewed. I can't tell you
2 whether they were formally placed in the Court's records. I
3 assume they were because they were subject to court order.
4 But they were given to me to review. I just assumed that they

were part of the Court record but I don't know one hundred percent as opposed to belonging to the defense counsel at some point in this thing.
MS. BROBST: I would move this in evidence as State's 3.
(WHEREUPON, the above referred to document was entered in evidence as State's Exhibit Number 3.)
Q Are you aware that there was a hearing in fact on whether these documents could be released because of certain privileges?
A Yes.
Q Okay. And the defense argued for their release against the attorney from Baltimore City for the Department of Social Services, is that correct?
A Yes.
Q Now, you are aware also that the defense in this case filed a motion for bifurcation of the issues in the sentencing hearing, are you not?
A Yes.
Q And in that motion they requested that the issue

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of principalship be tried separately from the issue of mitigation?
A That's correct.
Q And was that motion granted or denied?
A Denied.
Q At the time the Wiggins case was tried in 1989 was the issue of whether a sentencing hearing could be bifurcated fully determined by the Court of Appeals yet?
A Not fully determined, but certainly their indication was on this question of principalship it wasn't

going to be.
Q In fact in what case was it finally determined?
A I cannot remember the name of the case. I'm sorry. I know has been finally determined that it is a unitary issue at this time.
Q Do you know what year that occurred?
A I think 1992 if I'm correct. I'm not one hundred percent sure.
Q That was the first time the Court of Appeals actually came right out and said that a judge doesn't have the discretion to bifurcate the issues in the sentencing hearing, is that correct?
A Correct.
Q So did you have an opportunity to read Mr. Schlaich's proffer of evidence at the sentencing hearing after

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they made their pitch on principalship?

* * * *

A Yes.

* * * *

[BY MS. BROBST:]
Q You know that there were or there was a case in Baltimore County tried this same year in which the trial court had granted bifurcation of the principalship issue from the other mitigating circumstances?
A I believe it was -- if you tell me it is

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Baltimore County I would say yes. I can't say that I know that with certainty. I knew about a case at the same time. I

wasn't hundred percent sure that it came out of Baltimore County.
Q Could it have been Gregory Jones in front of Judge Sfekas?
A I'm not sure that anybody provided me the name of the case. It was something discussed at one of these occasions with capital counsel.
Q You would agree that it was somewhat in vogue at that time to request bifurcation?
A I'm not sure if I recall it that way. It was an issue that was addressed by defense counsel.
Q And Mr. Schlaich argued after, as I said, he made his pitch on principalship, that he couldn't introduce this mitigating circumstance that he had developed through DSS and through this psychologist because he felt that that would have a spill-over effect on the principal issue, did he not?
A I would have to look back in the record. I can't remember his exact words. That sounds like what I recall. If you are referring to the argument that he is making at the bottom of Page 114, the first page that you showed me here -- I think I just need to make something clear in terms of what I'm saying. I think there is a big difference between psychiatric or psychological evidence in

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the sense of testing or a psychiatrist to talk about mental state than there is in doing a psycho-social history. What at least I see Mr. Schlaich here saying is that he was concerned about the potential prejudice if he were to put on Dr. Stejskal or however he pronounces it, and the psychological evidence. I think that is different. It is different than what I'm talking about, about the development of a psycho-social background which is a more historical

matter as opposed to testing and questions of legal questions about certain issues.
Q Such as those materials that would be contained in the DSS reports from Baltimore City?
A Well, that is information but it is not put into a coherent whole in any way. I think one of the things that Dr. Selvog does is he takes that information and follows it up in terms of talking with family members, in talking with Mr. Wiggins, and doing other things and brings out further information about the details of what was going on and then shows how that entered into the overall background picture of Mr. Wiggins. That is not what testing is. That is not what psychiatric work is. When we talk about developing mitigation, you talk about looking into psychiatric issues, you talk about doing psychological testing. Those are different things than what Dr. Selvog or Mr. Selvog, whatever his formal title is, and

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what NCIA does. That is different.
Q Okay. You testified on direct examination, and correct me if I'm wrong, that you felt it was a tactical error, an incompetency of counsel to merely rehash the lingering doubt or the reasonable doubt element and not present other evidence of mitigating circumstances?
A I don't know if I used -- I can't remember the exact word. It is a decision that I considered not to be competent for two reasons: Because there is not an exclusivity between the two things; they are not mutually exclusive; and they hadn't done the workup. Even if they made that decision as a tactical decision, they hadn't done the workup to make the sound tactical decision. You can't make your decisions in a vacumn. At least from what I see that

wasn't done.
Q But they were prepared, you will agree from the transcript, to introduce psychological and DSS records in mitigation had their motion to bifurcate been granted?
A According to this statement, yes.
Q According to what Mr. Schlaich says on the record in the transcript?
A Yes.
Q And to that extent there was a tactical reason, whether you agree it was a good one or not, it was a plan; it was something they had thought about and considered, is that

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correct?
MR. VERRILLI: Objection.
THE COURT: Overruled.
A Quite frankly I don't know how much they thought about it or whatever. I know that -- as it is phrased here, it was informing the Court that they could not determine that they could present this psychological evidence and the DSS evidence if bifurcation were not granted.
Q And in fact the way the argument went, he was also trying to make a ground for appeal, wasn't he? In other words, saying you forced my hand; by failing to grant my motion to bifurcate, you, Judge, have prohibited me from introducing this?
A I can't tell you -- again, I haven't heard Mr. Schlaich testify about what else he was doing or whatever. He made the statements. They stand in the record. Whether he was trying to create an issue for appeal I really don't know.
Q Okay. Wouldn't that be a reasonable thing to conclude from the way the record reads?
MR. VERRILLI: Objection, Your Honor.

MS. BROBST: He has testified he is an expert.
THE COURT: You are asking as far as reasonable is concerned. I think I will sustain that objection.
Q You also stated -- actually counsel for Petitioner stated that this was done to the exclusion, this

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relitigation of reasonable or lingering doubt, done to the exclusion of all other mitigating evidence; in fact that is not entirely accurate, is it?
A The only things that were done in terms of mitigation that I saw was those references in the presentence report and I believe they presented Dr. Johnson from American University to talk generally about adjustment of individuals who are serving life sentences in prison. I'm trying to remember. I just have to look at my own notes. I think that was pretty much the sum and substance of the mitigating evidence that was presented. That was the additional things that were done.
Q This is with respect to the impact on the jury of the instruction that the defendant has already been convicted and that decision is binding on you. Isn't it true that in Maryland in fact the jury has to go on to make an additional decision not merely is one guilty of first degree murder, but whether one is a principal in the first degree?
A Yes.
Q So to that extent the State bears a greater burden, is that correct?
A It is an additional burden. Sometimes it is the same burden as proving guilt, depending upon what the facts in the case are. If you have facts that basically go towards one person did the crime and the defendant has been convicted of

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the crime, then principalship although in law it is an additional decision, is I think pretty much a foregone conclusion.
When you have situations when there are a number of people who are acting in concert and one is the triggerman and the others are not, then I think it is a much more difficult issue and a much greater burden for the State.
I don't think that is operating here. I think this was pretty much a case where the conclusion was that one person did this and that person was the person who was convicted of doing that. No one else was charged ultimately. I know the lady who testified yesterday was initially charged but ultimately charges were dismissed.
So I think principalship was pretty much guilt/innocence in this case.
Q Obviously you did not see Dr. Korrell testify?
A No.
Q Have you ever seen Dr. Korrell testify?
A No.
Q Is it your expert opinion that it is never better to leave a witness alone? In other words there is never an occasion where no cross-examination is appropriate?
A No, that is not my opinion.
Q Isn't it true where there can be occasions where a witness was so unhelpful to the proponent of that witness,

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that it would be incompetent to cross examine that witness?
A There are times when that is true.
Q In fact on those occasions cross can be counter productive, is that correct?

A Potentially, yes.
Q And obviously you weren't present during the discussions on whether the defendant, petitioner in this case, should proceed court or jury on guilt/innocence?
A No.
Q And have no direct knowledge of what occurred?
A No.
Q Okay. Now, you have opined in this case with respect to whether the state had a greater or different burden on principal first than just to prove guilty of the murder beyond a reasonable doubt?
A Right.
Q It is your opinion in this case that they did not?
A I think it was pretty much -- yeah, I think it is pretty much one in the same issue in this case given the facts of this case.
Q And two months after a Court convicted him of first degree murder a jury found that he was a principal in the first degree to that murder, is that correct?
A Yes.

* * * *

In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
Post Conviction Hearing
April 7, 1994
Towson, Maryland

Before: Honorable John F. Fader, II, Associate Judge

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23 THE COURT: I think there is no way that I'm
24 going to be able to say, Ms. Brobst, in this case, that it was
25 not error to have this report. I don't think I would ever be

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1 able to get away with that. I do believe that it was error by
2 the attorneys not to have this report prepared.
3 The question is whether or not it is harmless
4 error or prejudicial error.
5 MR. VERRILLI: That's right. We think the
6 evidence is sufficiently powerful and is of exactly the kind,
7 exactly the kind of of evidence that the Supreme Court has
8 recognized juries must consider. That is because it is
9 important to juries making this resonable, moral deliberation
10 as to whether the defendant should live or die. This is what
11 it is all about; do we have some reason to understand how this
12 act could have happened; some reason to see this as a human

13 being, as a person who despite having been found to have done
14 something horrible, deserves some measure of forgiveness, some
15 measure of mercy or empathy. That is what it is all about.
16 That is what capital sentencing is all about.
17 THE COURT: Anything else?
18 MR. VERRILLI: That is what this evidence is all
19 about. I imagine we will need some rebuttal. There is a lot
20 more to be discussed here. I think it might make sense now
21 hear from Ms. Brobst.
22 THE COURT: What do you think about this, Ms.
23 Brobst?
24 MS. BROBST: With respect to where there was
25 error, I understand that the Court has sort of telegraphed

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1 that you will find.
2 THE COURT: I have got to find that. I don't
3 ever remember a death penalty case that there was not this
4 social history done. I think Penry has said loud and clear
5 that these things must be considered. And other cases have
6 said they must. Not to do a social history, at least to see
7 what you have got, to me is absolute error. I just -- I would
8 be flabbergasted if the Court of Appeals said anything else.
9 I really don't think that that is even a close question,
10 Ma'am.

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[THE COURT]
24 that. So therefore, based upon the evidence that I have seen
25 I'm concluding it was error for them not to investigate it

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because I don't have any information before me to believe that they did not have this information available to them. The only explanation I have is Schlaich's, which said that I wanted to double dip. He could have gotten his double dip and have gone alternatively also.
You see, the context of this case, and I understand what you are saying, but the context of this case is that I have no reason to believe that they did have all of this information.

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